

No. 12592

United States
Court of Appeals
For the Ninth Circuit.

LAWRENCE A. WHITE and ERMA R. WHITE,
Appellants,
vs.
CLARA M. EAGLESON,
Appellee.

Transcript of Record

Appeals from the District Court,
for the Territory of Alaska
Third Division

FILED

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PAUL P. O'BRIEN

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

WENDELL P. KAY,

CUDDY & KAY,

Attorneys at Law,

Anchorage, Alaska,

For the Plaintiff.

WILLIAM W. RENFREW,

DAVIS & RENFREW,

Attorneys at Law,

Anchorage, Alaska,

For the Defendants.

In the United States District Court for the
Territory of Alaska, Third Judicial Division

No. A-5495

CLARA M. EAGLESON,

Plaintiff,

vs.

LAWRENCE A. WHITE and ERMA R. WHITE,
Defendants.

COMPLAINT

The plaintiff complains of the defendants, and for
cause of action, alleges:

I.

That at all times herein mentioned plaintiff was,
and now is, a duly licensed real estate broker and
engaged in business in the City of Anchorage, Third
Judicial Division, Territory of Alaska.

II.

That on the 7th day of July, 1948, plaintiff was
employed by the defendants to procure a purchaser
of a certain going business known as "L W Choco-
late Shop" at 744 Fourth Avenue, in the City of
Anchorage, Alaska; that thereafter the said agree-
ment of employment was extended until the 30th
day of April, 1949; that a copy of said authorization
to sell is attached hereto marked Exhibit "A" and
made a part hereof by reference.

III.

That in consideration thereof, the defendants

promised and agreed to pay to plaintiff for her services a commission of ten per cent (10%) upon the selling price thereof.

IV.

That thereafter, and during the month of April, 1949, the plaintiff was instrumental in obtaining one John Doe Pinkering to purchase said property, and the plaintiff is informed and believes, and upon the basis of such information and belief, alleges it to be a fact, that on a certain day in the month of April, 1949, the exact date being unknown, said property was duly sold by the defendants to the said John Doe Pinkering for the sum of Thirty-five Thousand and no/100 (\$35,000.00) Dollars.

V.

That the agreed commission amounting to Three Thousand Five Hundred and no/100 (\$3,500.00) Dollars by reason of the premises became due and payable by the defendants to the plaintiff on the date of said sale, but that the same has not been paid nor any part thereof.

Wherefore, plaintiff prays for judgment against the defendants in the sum of Three Thousand Five Hundred and no/100 (\$3,500.00) Dollars, for a reasonable attorney's fee, and for costs of suit.

/s/ CLARA M. EAGLESON.

United States of America,
Territory of Alaska—ss.

Clara M. Eagleson, being first duly sworn on oath,
deposes and says:

That she is the plaintiff in the foregoing Com-
plaint; that she has read the same, knows the con-
tents thereof and believes the same to be true.

/s/ CLARA M. EAGLESON.

Subscribed and Sworn to before me this 6th day
of May, 1949.

[Seal] /s/ WENDELL P. KAY,
Notary Public in and for
Alaska.

My commission expires: 1-25-52.

Exhibit "A"

Authorization to Sell

Seattle & I
Radio

(Confidential
Listing)

I, Lawrence A. White and Erma R. White of
Anchorage, Territory of Alaska, have this day given
Clara M. Eagleson, Licensed Real Estate Broker,
in and for the Territory of Alaska, the exclusive sale
or transfer of real estate situated at: Anchorage,
Alaska.

To wit: Lin Chocolate Shop with installed
equipment less inventory (\$5000) doing business
under name of above and consisting of combined
candy making and retail and restaurant at 744 4th

Ave. Lease \$450/mo. rent until Nov. 1951—option 1 yr.

Property of and of record in the name of above.

I hereby appoint and constitute Clara M. Eagleson as my lawful agent and authorize said agent to enter into written agreement for me and on my behalf and in my name, for the sale of said real estate for the agreed price of \$45,000.

I agree to make a satisfactory deed and to give clear abstract of title, if so required, showing the title to be fully vested in me.

In consideration of the services of said agent in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said agent out of first payment a commission due on total sale price of 10% of \$45,000 payable at the office of the said agent. Any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property. Should a deposit secured by said agent be forfeited, one-half hereof may be retained by said agent and the balance shall be paid to me. The agent's share of any forfeited deposit, however, shall not exceed my commission.

I hereby list said property exclusively with said agent for a period of 60 days. I agree to pay said agent the commission set forth in this agreement, if a sale is made within 60 days after the termination of this Authorization to Sell, to parties with whom

said agent negotiated during the time of the Authorization to Sell.

Authorziation to Sell made in duplicate. Seller hereby acknowledges receipt of a copy of this agreement.

Dated: July 7, 1948, Anchorage, Alaska.

Period Mar. 1, 1947—Feb. 28, 1948.

Gross Receipts—\$118,224.84

Net Income—\$22,517.44

8 employees

Care

/s/ LAURENCE A. WHITE,
ERMA R. WHITE.

Extension until 4/30/49

Law

22

3-23

[Endorsed]: Filed May 6, 1949.

[Title of District Court and Cause.]

SEPARATE ANSWER OF
LAWRENCE A. WHITE

Comes now Lawrence A. White, one of the above-named defendants, and answering for himself but not for his co-defendant, admits denies and alleges as follows:

I.

Defendant admits the allegations of Paragraph I of plaintiff's complaint.

II.

Defendant admits the allegations of Paragraph II of plaintiff's complaint, except that defendant alleges that the agreement was not extended for or on behalf of the defendant, Erma R. White.

III.

Defendant admits the allegations of Paragraph III of plaintiff's complaint.

IV.

Defendant denies each and all the allegations of Paragraph IV of plaintiff's complaint.

V.

Defendant denies each and all the allegations of Paragraph V of plaintiff's complaint, save and except the allegation that no money has been paid to the plaintiff by the defendant, and that allegation is admitted, and in that connection defendant Lawrence A. White, alleges that the agreement between plaintiff and defendants had expired by its terms prior to the time any sale of the premises was had and prior to the time that any agreement for sale of the premises was made, and that plaintiff was not instrumental in any manner in interesting the buyer in purchasing the property and such purchase was consummated by direct negotiations between the sellers and the buyer after the expiration of the agreement mentioned in plaintiff's complaint, and without any effort on behalf of the plaintiff therein, and as defendant believes, plaintiff is not entitled to any commission on account of such sale.

Wherefore, having fully answered plaintiff's complain, defendant, Lawrence A. White, prays that plaintiff take nothing thereby and that defendant may have and recover of and from the plaintiff defendant's costs and disbursements in this action incurred, including a reasonable attorney's fee to be set by the Court.

DAVIS & RENFREW,
Attorneys for Defendant,
Lawrence A. White,

By /s/ EDWARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

Edward V. Davis, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, Lawrence A. White, in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true; that defendant, Lawrence A. White, is absent from the City of Anchorage, the place where this verification is made, and that therefore your affiant makes this affidavit.

/s/ EDWARD V. DAVIS.

Subscribed and sworn to before me this 13th day of June, 1949.

[Seal] /s/ MILDRED MORIARTY,
Notary Public for Alaska.

My Com. expires: 12-20-50.

Receipt of copy acknowledged.

[Endorsed]: Filed June 16, 1949.

[Title of District Court and Cause.]

SEPARATE ANSWER OF ERMA R. WHITE

Comes now Erma R. White, one of the above-named defendants, and answering for herself but not for her co-defendant, admits, denies and alleges as follows:

I.

Defendant admits the allegations of Paragraph I of plaintiff's complaint.

II.

Defendant admits the allegations of Paragraph II of plaintiff's complaint, except that defendant alleges that the agreement was not extended for and on behalf of the defendant, Erma R. White, and said agreement expired by its terms as to such defendant on or about the 7th day of September, 1948.

III.

Defendant admits the allegations of Paragraph III of plaintiff's complaint.

IV.

Defendant denies each and all the allegations of Paragraph IV of plaintiff's complaint.

V.

Defendant denies each and all the allegations of Paragraph V of plaintiff's complaint, save and except the allegation that no money has been paid to the plaintiff by the defendant, and that allegation is admitted, and in that connection defendant, Erma R. White, alleges that the agreement between plaintiff and defendants had expired by its terms prior to the time any sale of the premises was had and prior to the time that any agreement for sale of the premises was made, and that plaintiff was not instrumental in any manner in interesting the buyer in purchasing the property and such purchase was consummated by direct negotiations between the sellers and the buyer after the expiration of the agreement mentioned in plaintiff's complaint, and without any effort on behalf of the plaintiff therein, and as defendant believes, plaintiff is not entitled to any commission on account of such sale.

Wherefore, having fully answered plaintiff's complaint, defendant, Erma R. White, prays that plaintiff take nothing thereby and that defendant may have and recover of and from the plaintiff defendant's costs and disbursements in this action incurred,

including a reasonable attorney's fee to be set by the Court.

DAVIS & RENFREW,
Attorneys for Defendant,
Erma R. White,

By /s/ EDWARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

Edward V. Davis, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, Erma R. White, in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true; that defendant Erma R. White, is absent from the City of Anchorage, the place where this verification is made, and that therefore your affiant makes this affidavit.

/s/ EDWARD V. DAVIS.

Subscribed and sworn to before me this 13th day of June, 1949.

[Seal] /s/ MILDRED MORIARTY,
Notary Public for Alaska.

My Com. expires: 12-20-50.

Receipt of copy acknowledged.

[Endorsed]: Filed June 16, 1949.

TRIAL BY JURY, FEBRUARY 20, 1950

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Opening statement to the Jury was had by Wendell P. Kay, for and in behalf of the Plaintiff.

Opening statement to the Jury was had by William W. Renfrew, for and in behalf of the Defendant.

Lawrence White, being first duly sworn, testified for and in behalf of the Plaintiff.

William W. Renfrew, of counsel for defendants, moves Court that jury be excused pending arguments on points of law; Jury excused.

William W. Renfrew, of counsel for defendants, moves Court for summary of judgment.

Argument to the Court was had by William W. Renfrew for and in behalf of the Defendants.

Motion denied.

Jury recalled.

Carl T. Rentschler, being first duly sworn, testified for and in behalf of the Plaintiff.

An authorization to sell dated 7/7/48 signed by Lawrence A. White and Erma R. White, was duly offered, marked and admitted as Plaintiff's exhibit 1.

At 11:50 o'clock a.m. Court duly admonished Trial Jury and continued cause until 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Carl T. Rentschler, heretofore sworn, resumed stand for further cross-examination for and in behalf of the defendants.

Wendell Dayton, being first duly sworn, testified for and in behalf of the Plaintiff.

At 2:50 o'clock p.m. Court duly admonished Trial Jury and continued cause until 3:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Rodney L. Johnston, being first duly sworn, testified for and in behalf of the Plaintiff.

Copy of agreement af sale dated 5/1/49, between Lawrence A. and Erma R. White and Herbert E. Pickering, was duly offered, marked and admitted as Plaintiff's exhibit 2.

Oliver J. Easley, being first duly sworn, testified for and in behalf of the Plaintiff.

Clara M. Eagleson, being first duly sworn, testified for and in her own behalf.

At 3:55 o'clock p.m. Court duly admonished Trial

Jury and continued cause until 4:05 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Clara M. Eagleson, heretofore duly sworn, resumed witness stand for further cross-examination for and in behalf of the Defendants.

Wendell P. Kay, counsel for Plaintiff, moves Court for leave to amend complaint by interlineation by striking word "March" in Line 1, paragraph 4, and substituting the word "April," Motion granted and Clerk is directed to make the amendment.

Wendell P. Kay, counsel for Plaintiff, moved Court for leave to amend complaint by interlineation

by substituting figure "35" for words "forty-five" in lines 6 & 7 in paragraph IV; the same substitution in Line 2 of paragraph V; by striking words "four" and substituting word "three" in line 6, paragraph V; and striking figure "4" and substituting figure "3" in line 6, paragraph V; motion granted.

Plaintiff rests.

William W. Renfrew, of counsel for Defendants, moves Court for directed verdict in favor of Defendants; Motion denied.

Herbert E. Pickering, being first duly sworn, testified for and in behalf of the Defendants.

At 5:00 o'clock p.m. Court duly admonished Trial Jury and continued cause until 10:00 o'clock a.m. of Tuesday, February 21, 1950.

Entered Feb. 20, 1950.

TRIAL BY JURY, FEBRUARY 21, 1950

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Lawrence White, heretofore duly sworn, resumed witness stand for further testimony for and in behalf of the defendants.

Defendants rest.

At 10:45 o'clock a.m. Court duly admonished Trial Jury and continued cause until 10:55 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

William W. Renfrew, of counsel for defendants, moves Court jury be excused pending arguments on points of law; jury excused.

William W. Renfrew, of counsel for defendants, moves for directed verdict for defendants on grounds Plaintiff has refused and failed to prove her case.

Argument to the Court was had by William Renfrew, for and in behalf of the Defendants.

Motion denied; Jury recalled.

At 11:15 o'clock a.m. Court duly admonished Trial Jury and continued cause until 2:00 p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Opening argument to the Jury was had by Wendell P. Kay, for and in behalf of the Plaintiff.

Argument to the Jury was had by William W. Renfrew, for and in behalf of the Defendant.

At 4:05 o'clock p.m. Court duly admonished Trial Jury and continued cause until 4:15 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Closing argument to the Jury was had by Wendell P. Kay, for and in behalf of the Plaintiff.

At 4:35 o'clock p.m. Court duly admonished Trial Jury and continued cause until 9:30 o'clock a.m. of Thursday, February 23, 1950.

Entered Feb. 21, 1950.

TRIAL BY JURY, FEBRUARY 23, 1950

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Whereupon the Court reads his instructions to the Trial Jury and John Mack and Don Carlquist were duly sworn by the Deputy Clerk as bailiffs in charge of said Jurors, and upon stipulation by and between respective counsel the Court directed that a sealed verdict be returned in this cause and at 10:04 o'clock a.m. the Trial Jury retired in charge of their sworn bailiffs.

Entered Feb. 23, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

I.

The contract which has been offered in evidence as Plaintiff's Exhibit No. 1 gave the plaintiff the exclusive right to sell the property during the life of the contract, or any valid extension thereof. The contract further provided that the plaintiff would be entitled to her commission if a sale was made by the owner (the defendants here) while the agreement was in effect. The evidence is conflicting as to whether or not the owner sold the property to Pickering before the expiration of the agreement with plaintiff on April 30th. If you should find from the evidence that the defendant White had entered into a definite agreement with Pickering by which White agreed to sell the shop to Pickering and Pickering agreed to buy it, and such agreement was made prior to the termination of plaintiff's agency on April 30th, and the execution of the contract was deferred merely for the purpose of evading liability to plaintiff for a commission, then there was a sufficient sale of the property within the stipulated time to entitle the plaintiff to her commission, and you should find for her.

Mercantile Trust Co. v. Lamar (Mo. 1910),
128 S. W. 20, at p. 22.

II.

The principal or owner under a contract or agency agreement such as is concerned in the present

case owes certain obligations and duties to his agent, just as the agent does to the principal. Each owes to the other the duty of performance according to the terms of their agreement, and each is required to observe good faith in dealing with the other. (Mecham Agency Sec. 596, et seq.) In the present case, the principal White had granted to plaintiff the exclusive right to sell the property involved, and had agreed that plaintiff would receive her commission even if a sale should be made by White himself during the life of the agreement. Defendants could not evade the liability for plaintiff's commission by reaching an agreement with a buyer during the life of plaintiff's agreement, but postponing the formal consummation of the sale until the agency expired.

Therefore, if you find from the evidence that the defendant, White, had entered into a definite agreement with Pickering by which White agreed to sell the shop to Pickering, and Pickering agreed to buy it, and such agreement was made during the month of April, 1949, and prior to the termination of plaintiff's agency agreement, and further find that the formal execution of the contract was postponed until May 1st by mutual agreement of White and Pickering in order to avoid liability to plaintiff for a commission, then the defendant was not dealing with the plaintiff in good faith, and the plaintiff would be entitled to the commission called for by the contract, and you should find for her.

Mercantile Trust Co. v. Lamar (Mo. 1910),
128 S. W. 20, at p. 22.

III.

The present contract provides that plaintiff is entitled to her commission if a sale is made during the life of the agreement, even if made by the owner without the intervention of assistance of the agent. There is a further provision of the contract providing that the owner will pay the commission agreed upon to plaintiff if a sale be made within sixty days after termination of the agreement, or any valid extension thereof, to parties with whom the agent negotiated during the life of the agreement.

In the present case there is no evidence that plaintiff or her representatives Rentschler ever dealt with the ultimate buyer, Pickering, during the life of the agreement. There is, however, testimony to the effect that the plaintiff and Rentschler, during that time, offered to assist in negotiations with Pickering, but that White specifically requested them not to do so. (White denies that he ever requested them not to deal or negotiate with Pickering.) It is for you, as judges of the facts, to say which, if any, of this testimony is credible and to be believed. You are instructed, however, that the principal has the right to control and direct the conduct of the agent with respect to matters entrusted to the agent. This right to direct and control the agent shall be exercised by the principal in good faith and in furtherance of the objectives of the agency agreement.

If you believe, therefore, from the evidence that White did request the plaintiff and Rentschler not to deal with Pickering, or forbade them to do so,

and that White made this request to evade any continuing liability to plaintiff for a commission under the provision of the agreement referred to above, and you further believe that plaintiff was ready and willing to negotiate with Pickering and would have done so but for White's request, then the plaintiff would be entitled to the same protection from the agreement as though she had in fact negotiated with Pickering, and you should find for the plaintiff.

Restatement, Agency, Sec. 14.

/s/ WENDELL P. KAY, of
CUDDY & KAY.

[Endorsed]: Filed February 23, 1950.

[Title of District Court and Cause.]

REQUESTED INSTRUCTIONS ON BEHALF
OF THE DEFENDANTS

I.

You are instructed that under the terms of the agreement executed between the parties, such agreement was merely an authorization to sell by the agent, and unless you find that the plaintiff, Clara M. Eagleson, was the procuring cause of the sale, the plaintiff Clara M. Eagleson is not entitled to recover from the defendants, and the verdict should be for the defendants in this matter.

II.

You are instructed that the phrase "procuring cause of the sale" as used in these instructions, means that the broker must have first called the purchaser's attention to the property, and must have started negotiations which culminated in the sale thereof. If you find that the defendant Lawrence A. White first called the purchaser's attention to the property, and started the negotiations which culminated in the sale, then you will find that the plaintiff was not the procuring cause of the sale, and plaintiff is not entitled to recover against the defendants or either of them.

III.

You are instructed that where an owner of property does nothing more than list his property with the broker for sale on commission at a stated price, the broker is entitled to his commission only when he is the procuring cause of the sale, and such listing does not prevent the owner from selling the property to a purchaser of his own procuring, or render the owner liable to the listing broker for a commission if the owner does so sell.

IV.

You are instructed that where an owner has given a broker an exclusive agency or right of sale to extend over a specific period of time, the owner may make a sale within that time without rendering himself liable to the broker for commissions, provided that the broker has not at the time of such

sale procured a person who is ready, able and willing to purchase the property on the terms set forth in the authorization to sell.

V.

You are instructed that to entitle a broker to receive a commission, he must accomplish what he undertook to do in his contract of employment, which in this case is the authorization to sell. Nothing short of that is sufficient to constitute a performance on the part of the broker, and a broker is not entitled to any compensation for unsuccessful efforts. As applied to the facts of this case, unless you find that Clara M. Eagleson was instrumental in selling the property to Herbert E. Pickering, you must find for the defendants.

VI.

If you find from the evidence in this cause that the defendants themselves sold the property to the purchaser at a price below the price mentioned in the authorization to sell, by reason of the fact that the purchaser refused to deal through a real estate broker, or otherwise, without the broker having been the procuring cause of the sale, then you must find for the defendants.

VII.

You are instructed that generally a listing of property for sale exclusively with one broker does not prevent the owner from selling the property himself without becoming liable to the broker for the payment of the commission. As applied to the

contract here in question, such contract purports to list the property exclusively with the agent or broker for a period of sixty days only. Such contract likewise sets forth that in case that sale is made by the owner while the agreement is in effect, that such sale shall not work a forfeiture of the commission. However, all parts of the agreement must be construed together, and the Court instructs you that as a matter of law, no consideration was given in the agreement for any promise on the part of the owners not to sell the property themselves, and no consideration was given which would support any promise by the owners to pay a commission to the broker on a sale made by the owners themselves where the broker did not interest the party purchasing the property. As applied to the facts of this case, if you should find that the defendants Lawrence A. White and Erma R. White sold the property in question to Herbert E. Pickering, the buyer, without the aid or intervention of the broker, Clara M. Eagleson, and without the plaintiff Clara M. Eagleson having interested the buyer in the property, then you must find for the defendants and against the plaintiff.

VIII.

You are instructed that the authorization to sell introduced into evidence in this case lists the property exclusively with the agent for the period of sixty days from July 7, 1948, and that the exclusive feature of such authorization expired on the 7th day of September, 1948. If you should find that after

the expiration of such exclusive feature of the authorization to sell that an attempt was made to extend the agreement until April 30, 1949, such extension would not be binding upon either of the defendants unless some consideration was given by the agent to the owners for such extension. The plaintiff is not entitled to rely on advertising done before the extension, or upon attempts to interest prospective buyers prior to the date of the extension as consideration for the extension.

IX.

You are instructed that according to the undisputed evidence, the property in question belonged to Lawrence A. White and Erma R. White as co-owners. It appears that both of such parties signed the original listing dated July 7, 1948. It does not appear that Erma R. White signed the extension of the agreement later granted by the defendant Lawrence A. White. Unless you find that Erma R. White expressly or by implication authorized the extension of the agreement, then you must find for the defendant Erma R. White in this action.

X.

You are instructed that if you should find the defendant Erma R. White is not liable to the plaintiff, but that the defendant Lawrence A. White is liable to the plaintiff, plaintiff's recovery could not in any event exceed 10% of the sale price of the interest of the defendant Lawrence A. White in the property.

XI.

You are instructed that under the undisputed evidence, the agreement executed between the parties was drawn up by the plaintiff, or her agent, and if you should find that such agreement is ambiguous in that some portions of such agreement conflict with other portions thereof, then you must construe such agreement against the plaintiff, and any doubt as to the plaintiff's powers or as to her right to recover under such agreement should be resolved against her.

XII.

You are instructed that if you find that during the period of time the authorization to sell was in effect between the plaintiff and the defendants, or either of them, that the defendant Lawrence A. White discussed with Herbert E. Pickering a sale of the business to Herbert E. Pickering, and that from these discussions a tentative agreement was reached, which agreement was contingent on the failure of the plaintiff to secure a buyer within the period of her authorization to sell, and that even though papers expressing the tentative agreement between the defendants and Herbert E. Pickering were drawn, but that such tentative agreement was not finally entered into between the sellers and the buyer, and was not executed until after the contingency named had happened, that is to say, until after final expiration of plaintiff's authorization to sell, then the plaintiff can recover nothing from the

defendants under her complaint, and you must find for the defendants.

[Endorsed]: Filed February 23, 1950.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

When you were accepted as jurors in this case you obligated yourselves by your oaths to well and truly try the matter in issue between the plaintiff and the defendants, and a true verdict render according to the law and the evidence as given to you on the trial. That oath means that you will not be swayed by passion, sympathy or prejudice, and that your verdict will be the result of a careful consideration of all the evidence and the instructions of the Court as to the law.

Neither the statements of counsel engaged in the trial of this case, nor the allegations of the pleadings, except so far as they constitute admissions, are to be considered by you as proof of the facts to which they relate. You should not regard or consider the relative financial condition of the parties to the suit, nor the effect of your verdict upon the parties, or

any of them, or attempt to arrive at a verdict based upon your individual or collective opinions as to the abstract principles of justice which should govern the case.

It is not for you to say what the law is or should be regardless of any idea you may have in that respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

No. 2

By this action plaintiff seeks to recover damages in the sum of \$3500 for an alleged breach of contract as a real estate broker. She alleges in her complaint that on July 7, 1948, she was employed by the defendants to sell the L. W. Chocolate Shop in Anchorage for \$45,000 upon which her commission would be 10%; that subsequently the contract was extended to April 30, 1949, and that in April, the plaintiff was instrumental in obtaining a purchaser to whom the defendants, in April, the exact date being unknown to plaintiff, sold the property listed with her for \$35,000.

The defendants deny that plaintiff was instru-

mental in procuring a purchaser and allege that the sale was negotiated by them after the contract with plaintiff had expired, and that the contract was not extended by the defendant Erma R. White.

The burden of proving by a preponderance of the evidence that plaintiff was instrumental in promoting purchase by Pickering is upon the plaintiff.

The principal question for your determination is whether the property was sold during the life of the contract or any valid extension thereof.

No. 3

Under the contract between the parties, plaintiff's Exhibit No. 1, the plaintiff was given the exclusive right to sell the property described in the complaint for 60 days and, if the extension was valid, for the further period ending April 30, 1949, with the right to receive the commission agreed upon if the defendants sold the property during the life of the contract, or if they sold the property within 60 days after April 30, 1949, to any person with whom the plaintiff had negotiated prior to April 30, 1949.

Defendants contend that the extension referred to was not authorized or ratified by the defendant Erma R. White and that consequently neither she nor the partnership is bound by such extension.

You are instructed that authorization or ratification by a partner may be shown by direct evidence, as by acts or written or spoken words, or it may be inferred from the surrounding facts and circumstances. It is for you to say whether there are any facts or circumstances from which authorization or

ratification by the defendant Erma R. White may be inferred. In determining this question you may take into consideration the fact that the contract with plaintiff, Exhibit No. 1, was executed by both defendants, the relations between them in the conduct of their business, the fact that the property in question was sold by them shortly thereafter, and all the other facts and circumstances.

However, before you would be warranted in inferring ratification on the part of the defendant Erma R. White, it would have to appear by a preponderance of the evidence that she knew of the extension and had an opportunity to repudiate it, and that the situation was such that she was obliged to speak if she did not consent rather than remain silent.

If you find that the defendant Erma R. White did not authorize or ratify the extension referred to, then neither she nor the partnership would be liable, but the defendant Lawrence A. White would be personally liable to the same extent as the partnership would be if the extension had been granted by both partners.

No. 4

It is contended by the plaintiff that the property was actually sold before April 30th to Pickering, but that the transaction was given the appearance of a sale after that date and, moreover, that she was dissuaded from negotiating with Pickering and that these acts were done by the defendants for the purpose of defrauding her of the commission.

Defendants contend that it was a bona fide sale

which was not consummated until after April 30th, that their dealings with Pickering were open and aboveboard, and that so far as dissuading her is concerned, all they did was to lay before her the facts about Pickering.

You are instructed that the law requires the utmost good faith on the part of the principal toward his agent. Each owes to the other the duty of performance according to the terms of their agreement.

In this connection, you are instructed that if you find from a preponderance of the evidence that at any time before April 30, 1949, Pickering agreed to buy and the defendants agreed to sell the property in question, and find that such agreement was unconditional and not contingent on the sale of the property by the plaintiff in the meantime, and further find that the formal execution of the sales contract, Plaintiff's Exhibit No. 2, was deferred to May 1, 1949, for the purpose of defrauding the plaintiff of her commission, you should find for the plaintiff in the sum of \$3500. On the other hand, if you do not so find, your verdict should be for the defendants.

You are also instructed that if you find that the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date.

No. 5

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

No. 6

Subject to the laws contained in these instructions, you are also the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence, except such evidence as is declared by the Court to be conclusive.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and

in subordination to the rules of evidence; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony. In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you would decide whether to believe something told you out of court. You size up the witness in court in the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the truth, the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, and the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on the witness' credibility and the weight of his testimony. When a witness has a strong personal interest in the outcome of a case, the

temptation to lie, or to color, distort or withhold the truth may likewise be strong. Notwithstanding that, however, you may find that he has told the truth. What has just been said concerning interest in the outcome of a case is likewise applicable to bias or prejudice against or a disposition to favor, either party. In other words, you should bring to bear upon your consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which you, as reasonable human being, have and exercise in every day affairs of life. Accordingly, you should draw from the evidence in this case all deductions which appear to you to flow logically from such evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case. A witness wilfully false in one part of his testimony may be distrusted in other parts. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening state-

ments and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

No. 7

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and you should not single out one particular instruction and consider it by itself or separately from or to the exclusion of all the other instructions.

As you have been heretofore instructed, your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

No. 8

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction,

founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

No. 9

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room the exhibits and these instructions, together with three forms of verdict.

If you agree upon a verdict during business hours, that is, between 9 a.m. and 5 p.m., you may have your foreman date and sign it and then return it into open court in the presence of the entire jury, together with these instructions and the unused forms of verdict. If, however, you agree upon a verdict after business hours, that is, after 5 p.m. one day and before 9 a.m. the following day, you should similarly have your foreman date and

sign it and seal it in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10 a.m. when the verdict will be received from you in the usual way.

Given at Anchorage, Alaska, this 23rd day of February, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed February 23, 1950.

TRIAL BY JURY, FEBRUARY 24, 1950

Now at 10:00 o'clock a.m. came the Jury, in charge of their sworn bailiffs who, on being called, each answered to his or her name, came also the respective counsel and said Jury did present, by and through their Foreman, in open Court, their verdict in cause No. A-5495, entitled Clara M. Eagleson, Plaintiff versus Lawrence A. White, and Erma P. White, Defendants which is in words and figures as follows, to wit:

Which verdict the Court ordered filed and discharged the Jury to report at 10:00 o'clock a.m. of Monday, February 27, 1950.

Entered Feb. 24, 1950.

In the District Court for the Territory of Alaska,
Division Number Three at Anchorage

No. A-5495

CLARA M. EAGLESON,

Plaintiff,

vs.

LAWRENCE A. WHITE, and ERMA R. WHITE,
Defendants.

VERDICT No. I.

We, the jury, duly impanelled and sworn to try
the above-entitled cause, find for the plaintiff and
against the defendants in the sum of \$3,500.00.

Dated at Anchorage, Alaska, this 23rd day of
February, 1950.

/s/ WARDIE W. KING,
Foreman.

Entered February 24, 1950.

In the District Court for the Territory of Alaska,
Third Division

No. A-5495

CLARA M. EAGLESON,

Plaintiff,

vs.

LAWRENCE A. WHITE, and ERMA R. WHITE,
Defendants.

JUDGMENT

The above-entitled action came on regularly for trial, commencing the 20th day of February, 1950, before the above-entitled Court at Anchorage, Alaska, the plaintiff being represented by Cuddy & Kay, her attorneys, and the plaintiff, Clara M. Eagleson, being present in person, and the defendant Lawrence A White being present in Court and the defendant Erma R. White not being present in Court, but both defendants being represented by Davis and Renfrew, their attorneys, a jury of twelve persons was regularly impanelled and sworn to try the cause and testimony, both oral and documentary, having been introduced and submitted on behalf of the plaintiff and defendants, whereupon the Court instructed the jury upon the law in the matter, and Counsel for both sides having argued the matter to the jury and the jury retired to consider their verdict, and upon stipulation of Counsel for both parties at the time the jury retired, the jury was directed to bring in a sealed verdict. Thereupon and at 10:00 a.m. on the 24th day of

February, 1950, the jury returned into Court and returned their sealed verdict, which upon being unsealed in open Court and in the presence of the jury was found to be a verdict in favor of the plaintiff, reading as follows: "Verdict No. I. We, the jury, duly impanelled and sworn to try the above-entitled cause, find for the plaintiff and against the defendants in the sum of \$3500.00. Dated at Anchorage, Alaska, this 24th day of February, 1950. Wardie W. King, Foreman."

Wherefore by virtue of the law and by reason of the premises aforesaid, it is hereby

Ordered, Adjudged and Decreed, that judgment be and is hereby given in favor of the plaintiff, Clara M. Eagleson, in the sum of Thirty-Five Hundred and No/100 (\$3500.00) Dollars plus interest in the sum of One Hundred Seventy-Five Dollars (\$175.00) and that the plaintiff shall have and recover of and from the defendant, plaintiff's costs and disbursements in the action incurred, to be taxed by the Clerk of the Court in the manner provided by law, and an attorney's fee in the sum of Five Hundred Dollars (\$500).

Dated at Anchorage, Alaska, this 27th day of February, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of Copy acknowledged.

Entered Feb. 27, 1950.

[Endorsed]: Filed Feb. 27, 1950.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND FOR
ENTRY OF JUDGMENT IN FAVOR OF
THE DEFENDANTS, LAWRENCE A.
WHITE AND ERMA R. WHITE

Come now Lawrence A. White and Erma R. White, the above-named defendants, and move that the verdict rendered by the jury in the above-entitled cause in favor of the plaintiff and against the defendants in the sum of \$3,500.00, rendered on the 24th day of February, 1950, together with the judgment entered by the Court following such verdict, may be set aside, and that judgment be entered in favor of the defendants Lawrence A. White and Erma R. White, in accordance with the motion of such defendants for directed verdict made at the close of plaintiff's case, and at the close of all of the evidence. In the alternative, defendants Lawrence A. White and Erma R. White, move for a new trial, all as will more fully appear from the motion for new trial filed herewith.

This motion is based upon the fact, that as will more fully appear from all the records and files of this action, defendants, at the close of plaintiff's evidence, and again at the close of all of the evidence, moved for the direction of a verdict in favor of the defendants, on the ground that the evidence was insufficient to justify a judgment in favor of the plaintiff and against such defendants, and in particular on the ground that the agreement on which plaintiff's action is based, should have been

construed against the plaintiff for the reason that such agreement as properly construed would not have prevented defendants from selling the property without being responsible to pay plaintiff a commission at the time the sale was made, and the Court should have instructed a verdict for the defendants on that ground.

Dated at Anchorage, Alaska, this 6th day of March, 1950.

DAVIS & RENFREW,

Attorneys for the Defendants Lawrence A. White
and Erma R. White,

By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed Mar. 6, 1950.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now Lawrence A. White and Erma R. White, the above-named defendants, and move that the verdict rendered in the above-entitled cause on the 24th day of February, 1950, together with the judgment rendered following such verdict, may be vacated and set aside, and that the defendants, Lawrence A. White and Erma R. White, may be granted a new trial in such action for the following reasons:

1. That the verdict as rendered by the jury is not supported by sufficient evidence, but is contrary to the evidence.

2. That the verdict against the defendants, Lawrence A. White and Erma R. White, as rendered, is against the law.

3. That certain errors of law occurred during the trial of the cause, which errors were objected to and excepted to by the defendants in the following particulars:

A. The Court erred in refusing to grant defendants' motion made for directed verdict made at the close of plaintiff's case and renewed at the close of all of the evidence.

B. That the Court erred in submitting the matter to the jury.

C. That the Court erred in giving the fourth and fifth paragraphs of instruction number four, for the reason that such instructions were not supported by any competent evidence, and were not justified in law in accordance with the pleadings and evidence of the case, and such instruction was excepted to by the defendants, all as will more fully appear from the exceptions taken at the close of the trial.

D. That the Court erred in refusing to instruct the jury as requested by the defendants in requested instructions numbered one through twelve, for the reason that such requested instructions were proper instructions to have been given under the pleadings of the case and in light of the evidence as given in the case.

E. That the Court erred in receiving the verdict of the jury in the above-entitled cause, for the rea-

son that such verdict is contrary to the evidence, and not supported by any substantial evidence, and for the reason that the plaintiff has wholly failed in her proof to show any liability of the defendants, Lawrence A. White and Erma R. White, to the plaintiff under the terms of the agreement which is the basis of this action.

Dated at Anchorage, Alaska, this 6th day of March, 1950.

DAVIS & RENFREW,
Attorneys for the Defendants Lawrence A. White
and Erma R. White.

By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed March 6, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Circuit Court of Appeals of the United States of America, for the Ninth Circuit:

Notice Is Hereby Given that Lawrence A. White and Erma R. White, the defendants above named, hereby appeal to the Circuit Court of Appeals of the United States of America for the Ninth Circuit, from that certain judgment entered in the above-entitled cause by the above-entitled Court on the 27th day of February, 1950, in favor of the plaintiff and against the defendants, in the amount of

Three Thousand Five Hundred Dollars (\$3500.00), together with costs and attorneys' fees.

Dated at Anchorage, Third Judicial Division, Territory of Alaska, this 28th day of March, 1950.

DAVIS & RENFREW,
Attorneys for Appellants, Lawrence A. White and
Erma R. White.

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1950.

MINUTE ORDER ENTERED MARCH 29, 1950
TRANSFERRING CAUSE
A-5495

Now at this time upon request of District Judge George W. Folta, of the First Division, presently presiding over the District Court for the First Ketchikan Division, at Ketchikan, Alaska.

It Is Ordered that cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. and Erma R. White, Defendants, be and is hereby transferred by registered air mail to First Ketchikan Division, Ketchikan, Alaska.

Entered Mar. 29, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION ON DEFEND-
ANTS' MOTIONS FOR JUDGMENT AND
FOR NEW TRIAL

Filed April 4, 1950

WENDELL P. KAY,
Attorney for Plaintiff.

DAVIS & RENFREW,
Attorneys for Defendants.

The contentions advanced by the defendants in their motions for judgment notwithstanding the verdict and for a new trial were considered and passed upon during the course of the trial. In the absence of briefs or the citation of any further authority, I am of the opinion that the rulings then made should be adhered to and that both motions should be denied.

Done in open court at Ketchikan, Alaska, this
4th day of April, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

Entered April 10, 1950.

[Endorsed]: Filed April 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Circuit Court of Appeals of the United States of America, for the Ninth Circuit:

Notice Is Hereby Given that Lawrence A. White and Erma R. White, the defendants above named, hereby appeal to the Circuit Court of Appeals of the United States of America for the Ninth Circuit, from that certain final judgment entered in the above-entitled cause by the above-entitled Court on the 27th day of February, 1950, in favor of the plaintiff and against the defendants, in the amount of Three Thousand Five Hundred dollars (\$3,500.00), together with costs and attorney's fees, the Court having overruled defendants' motion for new trial and for judgment notwithstanding the verdict on the 4th day of April, 1950.

Dated at Anchorage, Alaska, this 19th day of April, 1950.

DAVIS & RENFREW,
Attorneys for Appellants, Lawrence A. White and
Erma R. White.

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above-entitled Court, and to
Cuddy & Kay, attorneys for the plaintiff, and
to Whom it May Concern:

Please Take Notice that Lawrence A. White and
Erma R. White, defendants above named and the
appellants in this action, designate the entire record
of this action as the record on appeal and specifi-
cally direct that all the records and the files in the
Clerk's office pertaining to the above-entitled action
are to be included in such records, and among other
things such record is to include specifically the
reporter's transcript of the evidence introduced on
the trial of the cause and all exhibits introduced
on behalf of both parties to the action.

Dated at Anchorage, Alaska, this 24th day of
May, 1950.

DAVIS & RENFREW,
Attorneys for Appellants, Lawrence A. White and
Erma R. White.

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed May 24, 1950.

[Title of District Court and Cause.]

STIPULATION

Wendell P. Kay, of the firm of Cuddy & Kay, on behalf of the plaintiff-appellee, and Edward V. Davis, of the firm of Davis & Renfrew, attorneys for the defendants-appellants, hereby stipulate and agree that appellants may have to and including the 30th day of June, 1950, to file and docket the record on appeal in the above-entitled matter, and stipulate that in the event reporter's transcript has not been completed prior to the time above mentioned that the records and files in the Clerk's office may be docketed within such period without the reporter's transcript and the reporter's transcript may be docketed at a subsequent date after the same is completed.

Dated at Anchorage, Alaska, this 24th day of May, 1950.

CUDDY & KAY,
Attorneys for Plaintiff-
Appellee.

By /s/ WENDELL P. KAY.

DAVIS & RENFREW,
Attorneys for Defendants-
Appellants.

By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed May 24, 1950.

[Title of District Court and Cause.]

ORDER

Stipulation of counsel for the respective parties having been filed with this Court by the terms of which it is agreed between the parties that appellants may have until the 30th day of June, 1950, to file and docket the record on appeal in the above-entitled cause, and the Court being fully advised in the premises,

Now, Therefore, it is hereby ordered, adjudged and agreed that appellants may have an extension of time to and including the 30th day of June, 1950, to file and docket the record on appeal in the above-entitled cause.

It is further ordered, adjudged and decreed that in accordance with such stipulation in the event the reporter's transcript has not been delivered prior to the time when the appeal should be docketed in accordance with this order, then the Clerk is directed to forward the records and files in his office exclusive of the transcript to the Court of Appeals for the Ninth Circuit at San Francisco, California, in order that such cause may be docketed in such Court, and the reporter's transcript may be docketed at a later date after the same has been furnished.

Done in open Court at Anchorage, Third Divi-

sion, Territory of Alaska, this 24th day of May, 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of copy acknowledged.

Entered May 24, 1950.

[Endorsed]: Filed May 24, 1950.

In the District Court for the Territory of Alaska,
Third Division

No. A-5495

CLARA M. EAGLESON,

Plaintiff,

vs.

LAWRENCE A. WHITE and ERMA R. WHITE,
Defendants.

Monday, February 20, 1950

Before: George W. Folta, District Judge.

Appearances:

WENDELL P. KAY,

CUDDY & KAY,

Anchorage, Alaska,

Appearing for the Plaintiff.

WILLIAM W. RENFREW,

DAVIS & RENFREW,

Anchorage, Alaska,

Appearing for Defendants.

(Whereupon, at 11:30 a.m., after selection of the Jury the above-entitled matter came on for taking of testimony.)

PROCEEDINGS

The Court: You may outline your case, if you will.

Mr. Kay: Thank you, Your Honor.

May it please the Court, Ladies and Gentlemen of the Jury, Mr. Renfrew.

At this stage of the proceedings for the benefit of the new members of the Jury the attorney for the plaintiff states what he expects to prove. Then the attorney for the defendant outlines what they expect to prove. Then we put on the testimony of the witnesses. These opening statements are made to give you an outline so that you will know what to expect when the witnesses are put on the stand.

Now, the plaintiff in this case, Ladies and Gentlemen, expects to prove that in July of 1948 Mr. Lawrence White, the defendant here, was the owner of a business known as the L & W Chocolate Shop and that Mr. White was desirous of disposing of the business and that he accordingly listed it with Mrs. Eagleson, a licensed real estate broker in the Territory of Alaska, doing business here in Anchorage, for sale, and that he entered into a written authorization to sell, giving Mrs. Eagleson the exclusive right to sell the property for a period of time; that instrument, of course, will be introduced in evidence.

Then we expect to prove that in accordance with her obligations as a licensed real estate dealer Mrs. Eagleson [3*] did considerable work in an attempt

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

to dispose of the Chocolate Shop at the price Mr. White was desirous of getting—\$45,000.

Mrs. Eagleson was to receive a commission, according to the agreement, of 10 per cent of the sale price. Now, Mrs. Eagleson through her agency, we expect to prove, did a considerable amount of advertising, procuring of prospects, taking the prospects to Mr. White, and otherwise fulfilling her functions under the agreement.

The agreement expired. It was a listing for 60 days, but the agency, Mrs. Eagleson, continued to exercise her activities in trying to procure a buyer. In April of 1949 Mr. Rentschler, who is connected with Mrs. Eagleson, her agent we will prove, went down to the Chocolate Shop and got Mr. White to initial an extension on the agreement extending the agreement until the 30th day of April, 1949.

Now, there are some other provisions of the contract which will appear when it is read to you but we expect to prove, Ladies and Gentlemen, briefly, that Mrs. Eagleson fulfilled her function, that the Chocolate Shop was sold to a buyer which she was instrumental in selling and that therefore she is entitled to her commission on the sales price.

Now, of course, the sale price, the date of the sale and the amount for which it was procured or which it was sold will appear in evidence. It may be necessary for us to amend [4] our pleading to conform to the proof in that regard. We allege it was sold for \$40,000; it may be that it was sold for \$35,000 or \$37,500.

Mr. Renfrew: Just a minute. I will have to object to counsel making an argument.

Mr. Kay: I am not; I was just stating facts.

Mr. Renfrew: He is limited to what he intends to prove, Your Honor.

The Court: He is merely stating now his intentions of possibly asking, whatever the proof shows, that the pleading be amended to conform to, and I think that would be within the outline of his case. Objection is overruled.

Mr. Renfrew: Very well.

Mr. Kay: But we will prove, Ladies and Gentlemen, that the place was sold to a Mr. Pickering, who will undoubtedly appear as a witness. Mrs. Eagleson is entitled to her commission on the sale. That Mr. White has refused to pay that commission and that therefore we are requesting you Ladies and Gentlemen to see that he does. That is all.

The Court: Have you a statement, Mr. Renfrew?

Mr. Renfrew: Yes, Your Honor.

Ladies and Gentlemen of the Jury, in general, as Mr. Kay has pointed out to you, this is an action instituted by Mrs. Eagleson versus Lawrence A. White and Erma R. White. Mrs. Eagleson alleges in her complaint that she was employed [5] by Mr. and Mrs. White in the month of July of 1948 as a real estate agent to sell a certain business and she attaches to her complaint a copy of that employment agreement which, as counsel has stated,

will be undoubtedly introduced in evidence and read to you.

She alleges in her complaint that she was to receive a commission of 10 per cent for the sale of the business; that she had the exclusive right to sell it for 60 days. She alleges an extension of that contract of sale and states in her complaint that during the month of March, 1949, she was instrumental in obtaining one John Doe Pickering to purchase said property, and she asks the commission on the sale of the property at \$45,000.

Now, we will prove, Ladies and Gentlemen, that Mrs. Eagleson had never met the purchaser of this business until months after he had purchased the property nor had any agent of Mrs. Eagleson at any time ever discussed the sale of this property with the man who purchased it.

We will likewise prove that the property was purchased by the present owner after the original contract and likewise after any extension of that contract was ever given or granted and that the sale of the property to the present owner was after the contract which Mrs. Eagleson had had expired. Thank you.

The Court: You may call your first witness. [6]

Mr. Kay: Call Mr. Lawrence White.

LAWRENCE A. WHITE

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Your name is Lawrence White?

A. Lawrence A. White, yes, sir.

Q. And you are the defendant in this action, sir?

A. Sir?

Q. You are the defendant in this action?

A. Yes, sir.

Q. And Erma R. White is your wife?

A. Yes, sir.

Q. Were you, Mr. White, in 1948 and early 1949, the owner of a place of business here in Anchorage known as the L. W. Chocolate Shop?

A. L. W., that is right.

Q. Was your wife connected with you in the operation of that business?

A. That is right, certainly she was.

Q. Were you doing business as partners?

A. How is that?

Q. Were you doing business as partners, Mr. White?

A. I am a little hard of hearing. [7]

Q. Was your wife, Erma R. White, a partner of yours in the operation of the business?

A. Certainly she was.

Q. Then you had a partnership between you and Mrs. White to operate Chocolate Shop?

A. Yes, sir.

(Testimony of Lawrence A. White.)

Q. And did that partnership relationship continue down to the time you sold it?

A. Certainly.

Q. Now, in the spring of 1949, did you sell the L. W. Chocolate Shop to Mr. Pickering?

A. May the 2nd, 1949.

Q. Would you answer the rest of the question?

A. Yes, sir.

Q. You sold it to Mr. Pickering?

A. Yes, sir.

Q. What was the total sale price, Mr. White?

A. \$35,000.

Q. And how much did you receive down?

A. \$6,000.00.

Q. And was the balance to be paid according to the terms of a conditional contract?

A. That is right.

Q. And is that contract in escrow in the Bank of Alaska? A. That is right. [8]

Mr. Kay: That is all.

Mr. Renfrew: At this time, Your Honor, I would like to make a motion.

The Court: In the absence of the jury?

Mr. Renfrew: Yes, Your Honor. It is for summary judgment.

The Court: The jury may retire.

Mr. Renfrew: Your Honor, the motion which I am about to make is in the nature of what I believe to be a Motion for Summary Judgment, based upon the contention that the facts as stated in the complaint and the pleadings do not state a claim upon

which the plaintiff is entitled to enter relief and could not go to the jury.

I wish to call Your Honor's attention to the answers which are filed in it, particularly with reference to paragraph V.

First, I will take up paragraph II, Your Honor. The defendant admits the allegations of paragraph II of Plaintiff's Complaint which alleges, "That on the 7th day of July, 1948, plaintiff was employed by the defendants to procure a purchaser of a certain going business known as the L. W. Chocolate Shop at 744 Fourth Avenue, City of Anchorage, Alaska; that thereafter the agreement of employment was extended until the 30th day of April, 1949; and a copy of said authorization to sell is attached hereto, marked 'Exhibit 'A' and made a part hereof * * *'" [9]

Now with reference to the separate answer of Erma R. White, Your Honor will note that we admit the allegations of paragraph II of Plaintiff's Complaint except that the defendant alleges that the agreement was not extended for and on behalf of the defendant Erma R. White and said agreement expired by its terms as to such defendant on or about the 7th day of September, 1948.

Now I wish to again call to the Court's attention Paragraph V of the Separate Answer of both defendants which reads, "Defendant denies each and all of the allegations of Paragraph V of Plaintiff's Complaint, save and except * * *" and Paragraph V of Plaintiff's Complaint alleges, "That the agreed commission amounting to \$4,500.00 by

reason of the premises became due and payable by the defendants to the plaintiff on the date of said sale, but that the same has not been paid nor any part thereof."

Now, with reference to Paragraph V of the Separate Answer, Your Honor, we allege that the defendant denies all of the allegations of Paragraph V of Plaintiff's Complaint save and except the allegations that no money has been paid to the plaintiff by the defendant and that allegation is admitted, and in that connection defendant, Erma R. White—or in the case of the Separate Answer of Lawrence A. White, defendant, Lawrence A. White—alleges that the agreement between plaintiff and defendants had expired by its terms prior to [10] the time any sale of the premises was had and prior to the time that any agreement for sale of the premises was made, and that plaintiff was not instrumental in any manner in interesting the buyer in purchasing the property and such purchase was consummated by direct negotiations between the sellers and the buyer after the expiration of the agreement mentioned in plaintiff's Complaint and without any effort on behalf of plaintiff therein, and as defendant believes, plaintiff is not entitled to any commission on account of such sale.

There has been no replies to those allegations according to our copy of the pleadings and I was unable to find any in the Court's file when I last checked.

Now, in view of the fact that the plaintiff has made no reply——

The Court: Well, but what makes you think a reply is required?

Mr. Renfrew: Well, on the face of the pleadings as they now stand, the sale was made after the date of the contract as is alleged, then there is no issue.

The Court: But the reason I asked the question is that under the rules a reply is not required unless there is a counter claim.

Mr. Renfrew: Under the state of the pleadings, Your Honor, it is my interpretation that a reply is necessary if any [11] issue is raised which would show that there was no liability on the face of the action.

The Court: They are presumed to be denied under the new rules except where there is a counter claim. The Court may order a reply to be filed in the proper circumstances and upon motion, but there is nothing like that before the Court.

Mr. Renfrew: We take the position, Your Honor, that in view of the fact that there is no reply to the answer which sets up a defense on the grounds that this sale was made after any contract and the contract is put in as a part of the plaintiff's case in chief; that is, it is attached to the complaint, and they call a witness, the first witness they call who testifies—it is their witness now—and that witness testified that the sale was made May 2nd, which is after the terms of the contract and they haven't denied it, I think we are entitled to summary judgment.

The Court: Well, it is presumed to be denied. The motion is denied. You may call the jury.

Mr. Renfrew: Do I understand the reason that Your Honor states that no reply is necessary unless a counter claim is filed?

The Court: That is what the rules provide now, except where the Court orders a reply filed.

Mr. Renfrew: I understand, Your Honor. [12]

The Court: You may call your next witness.

Mr. Kay: Call Mr. Rentschler.

CARL T. RENTSCHLER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Your name is Carl A. Rentschler?

A. Carl T. Rentschler.

Q. And what is your occupation, Mr. Rentschler? A. Real estate broker.

Q. Are you connected with anyone in that business, Mr. Rentschler?

A. Yes, Clara M. Eagleson.

Q. And are you acquainted, Mr. Rentschler, with the defendant in this case, Lawrence A. White and Erma R. White?

A. Very well acquainted.

Q. Did you have occasion to have any discussion with Mr. and Mrs. White in the summer of 1948 with reference to the L. W. Chocolate Shop?

A. Yes, I did.

Q. Will you state, please to the Court and jury

(Testimony of Carl T. Rentschler.)

just what those conversations consisted of, Mr. Rentschler?

Mr. Renfrew: We object now to any conversations; if this action is based upon this contract the contract will [13] speak for itself.

Mr. Kay: All I was trying to lead up to was the signing of the contract.

Mr. Renfrew: It is admitted in the pleadings, isn't it?

The Court: I don't know whether you have admitted it or not. I think you did.

Mr. Renfrew: I didn't look at this case until twenty minutes to ten this morning, but that is my understanding, as fast as I read it this morning.

Mr. Kay: I am not so procrastinating. I looked at it yesterday afternoon, and it is my interpretation that is necessary to prove the contract.

Mr. Renfrew: It is admitted in Paragraph II.

The Court: If he admits it, it is sufficient.

Mr. Kay: Can't I still ask him about the conversations leading up to it?

Mr. Renfrew: It is immaterial.

The Court: It all depends whether the conversations would produce something that emerged in the contract.

Q. (By Mr. Kay): Did you have any conversations with Mr. White concerning listing his place for sale? A. Yes.

Q. And did those conversations result in the signing of an Authorization to Sell? [14]

A. Yes.

(Testimony of Carl T. Rentschler.)

Q. I will show you an instrument, ask you to examine it, and tell the jury whether you ever saw it before and what it is?

A. This is a contract authorizing the real estate firm of Clara M. Eagleson——

Q. Do you recollect it? A. Yes.

Q. Was it executed by Lawrence and Erma White on about the date that appears?

A. Yes.

Mr. Kay: I offer it in evidence.

Mr. Renfrew: Is it a copy of the one that is attached to the pleadings?

Mr. Kay: It was the original.

Mr. Renfrew: I notice, Counsel, that the notations on the back do not appear on the copy filed with the Complaint. Do they have any materiality?

Mr. Kay: I don't know what they are. I will ask.

Mr. Renfrew: I notice, Your Honor, on the reverse of this copy it bears notations there which are not upon the copy which was served with the complaint. At least, not upon the certified copy of the Complaint which we received. However, upon counsel's statement that they will not be referred to and have not any material effect upon this case, I have no [15] objection to the contract going in.

The Court: It may be admitted then and marked Plaintiff's Exhibit No. 1.

(Document referred to admitted in evidence

(Testimony of Carl T. Rentschler.)

as Plaintiff's Exhibit No. 1, Witness Rentschler.)

Mr. Renfrew: I will waive the reading of it.

Mr. Kay: I will be glad to read it.

PLAINTIFF'S EXHIBIT No. 1

Ladies and Gentlemen, in the upper left hand corner appears the words, Seattle P.I. and a word which I cannot read. Authorization to Sell. Confidential listing. I, Lawrence A. White, and Erma R. White of Anchorage, Territory of Alaska, have this day given Clara M. Eagleson, licensed real estate broker in and for the Territory of Alaska, the exclusive sale or transfer of real estate situated at Anchorage, Alaska, to wit: L. W. Chocolate Shop with installed equipment (\$5,000) doing business under the name above and consisting of combined candy making and retail and restaurant at 744 Fourth Avenue. Lease \$450 month rent until November, 1951, option 1 year.

"Property of and of record in the name of above.

"I hereby appoint and constitute Clara M. Eagleson as my lawful agent and authorize said agent to enter into written agreement for me and on my behalf and in my name, for the sale of said real estate of the agreed price of \$45,000.00.

"I agree to make a satisfactory deed and to give clear [16] abstract of title, if so required, showing the title to be fully vested in me.

"In consideration of the services of said agent

(Testimony of Carl T. Rentschler.)

in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said agent out of first payment a commission due on total sale price of 10% of \$45,000, payable at the office of the said agent. Any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property. Should a deposit secured by said agent be forfeited, one-half hereof may be retained by said agent and the balance shall be paid to me. The agent's share of any forfeited deposit, however, shall not exceed my commission.

“I hereby list said property exclusively with said agent for a period of 60 days. I agree to pay said agent the commission set forth in this agreement, if a sale is made within 60 days after the termination of this Authorization to Sell, to parties with whom said agent negotiated during the time of the Authorization to Sell.

“Authorization to Sell made in duplicate. Seller hereby acknowledges receipt of a copy of this agreement.

“Dated July 7, 1948. [17]

“Anchorage, Alaska

“/s/ LAWRENCE A. WHITE,

“ERMA R. WHITE.

(Testimony of Carl T. Rentschler.)

“Period Mar. 1, 1947-Feb. 28, 1948.

“Gross Receipts—\$118,224.84.

“Net Income—\$22,517.44.

“8 Employees.

“Extension until 4/30/49.

“L.A.W.”

[Original filed June 29, 1950.]

Q. (By Mr. Kay): Now, Mr. Rentschler, with regard to the notations which I last read on that contract—Extension until 4/30/49—did you have any conversations with Mr. White at the time of the procuring of that extension?

A. Yes, I did.

Q. Now——

Mr. Renfrew: May we have the time and place and persons present?

Q. (By Mr. Kay): Would you state the time, to the best of your recollection, the place where the conversation occurred and the number of persons who were present, if any?

A. My recollection, it was approximately April, April 8, 1949, and there were no persons present other than the normal customers in the shop. There was no one particularly who [18] was cognizant of what Mr. White and I were accomplishing.

Q. And what conversation took place then, Mr. Rentschler, between you and Mr. White?

A. I had been working on the sale of it——

Mr. Renfrew: Objected to as not responsive to the question.

(Testimony of Carl T. Rentschler.)

The Court: It is only available to the party conducting the examination. You have to object on some other grounds. That it is not responsive, that objection is only available to the one conducting the examination.

Mr. Renfrew: I object to it on the grounds that it is irrelevant, and immaterial, incompetent.

The Court: Overruled.

Q. (By Mr. Kay): You may answer the question. Read the question again.

(Question read.)

A. I had been working on the sale of the L. W. Shop for some time without having a contract——

Mr. Renfrew: I object to this on the ground that it states an opinion of what this witness has been doing for some time, not in the presence of the defendant.

The Court: The objection, as I take it, is that it is incompetent; and the objection is sustained.

Q. (By Mr. Kay): Just state what the conversation was, Mr. Rentschler. [19]

A. The conversation was to this effect: That since we have several interested parties to buy the property, that I would like to have a contract extension which would give me some security for the sale of that property. That was very agreeable with Mr. White and at that time he gave the extension which appears on the original contract.

Q. Now, at about that time, Mr. Rentschler, did you learn or know anything about a gentleman by the name of Pickering? A. Yes, I did.

(Testimony of Carl T. Rentschler.)

Q. Well, now, did you have any discussion or conversation with Mr. Lawrence White concerning Mr. Pickering? If so, tell us when it took place, who was present to the best of your recollection, and then I will ask you what was said.

A. On or about that time Mr. White mentioned the fact that Mr. Pickering, who was working in his shop at the time, was very interested in purchasing the property, but that he had not offered Mr. White the amount of money for the property that he desired.

Also, Mr. White mentioned that there was a possibility that we could get Mr. Pickering to give him the price that he wanted were I to attempt to secure someone who showed sufficient interest so that Mr. Pickering might think the property were being sold out from under him.

The conversation led to an agreement—verbal agreement—between Mr. White and myself that I would get the [20] interested buyers I had and attempt to coerce them into showing Mr. Pickering that the property was just about to be sold to some other person.

Mr. Renfrew: Now, we object to that testimony, your Honor, and ask that it be stricken on the grounds that it has no tendency to explain a written contract. It seems to be some separate concoction. Counsel can't rely upon a written contract and then rely upon some other agreement.

The Court: As I take it, I think this goes to another aspect of the case and that is whether or not a purchaser was secured or whether it was not

(Testimony of Carl T. Rentschler.)

this arrangement or what the plaintiff did was not the procuring cause of the sale, so it will have to be overruled on that ground.

Q. (By Mr. Kay): In other words, Mr. White asked you to——

Mr. Renfrew: I object to Counsel stating “in other words.” He can ask the question over again if he didn’t understand it.

Q. (By Mr. Kay): What did Mr. White request you to do at that time in connection with Mr. Pickering, if anything?

A. Mr. Pickering, it was stated to me by Mr. White, was a good prospect for buying the business and had made an offer that did not come up to the price that Mr. White wanted. I mentioned that possibly I should contact Mr. Pickering in [21] that it was my business selling real estate, and I might be able to accomplish the desired end. But, I was told by Mr. White that Mr. Pickering has a definite aversion to real estate agents and that I should not attempt to contact him in any way.

Q. What else did Mr. White request you to do in connection with Mr. Pickering, if anything?

A. Mr. White thought that, perhaps if I secured some prospects that I had been dealing with and brought them in the Shop and made it look like they were very interested in the property, that perhaps Mr. Pickering would come up with the additional amount which he desired for a purchase price.

Q. Did Mr. White mention any price to you at that time? A. To my knowledge, no.

(Testimony of Carl T. Rentschler.)

Q. Now, was anything else said during this conversation at that time that you can recall?

A. It was agreed by me that I would attempt to get these parties into the L. W. Shop in Mr. Pickering's presence so that we should accomplish what we had decided between ourselves.

Q. Now, after securing this extension of the agreement—Let's go back. After securing the original contract from Mr. White, what, if anything, did you do in connection with attempting to sell the place?

A. Myself — notwithstanding the office — contacted—and I had the names and dates—approximately 15 persons [22] who were personally taken through the shop for the purpose of purchasing. Now, I want to explain at this time that the original contract, if you will notice, was a confidential listing. Now, to a real estate agent, a listing of that sort instructs you that it should not be publicly advertised as a certain business in that Mr. White thought that it would be detrimental to his business to have the people know that it was being sold and also he didn't want his employees to know that it was being sold.

It put me in a very difficult position attempting to show the property to any prospective clients, but I did succeed in taking around ten people through it.

Q. Now, what, if anything, did you do after April 8, the date on which you obtained the extension in connection with the sale of the property, Mr. Rentschler?

(Testimony of Carl T. Rentschler.)

A. I took several persons through the shop after ducing Mr. Pickering to come up to the stipulated price, but I was instructed on several occasions to not contact Mr. Pickering and it is a real estate agent's duty to——

Mr. Renfrew: I object to this now as an opinion.

The Court: Objection sustained.

Q. (By Mr. Kay): You were instructed several times by Mr. White not to contact Mr. Pickering, is tht right? [23]

A. That is correct.

Q. Now, during April of 1949 did you have any conversations with a Mr. Bonecutter and a Mr. Easley concerning the situation?

A. Yes.

Q. I am not going to ask you what those conversations were, but do you recall approximately the date on which you talked to them?

A. Approximately between the 15th and 20th of April.

Q. As a result of those conversations did you do anything?

A. Yes, I passed the information to Mrs. Eagleson to the effect——

Mr. Renfrew: Just a minute, now. I——

Q. (By Mr. Kay): No, don't— Now, having passed the information to Mrs. Eagleson, did you do anything then in connection with Mr. White?

A. I contacted Mr. White and mentioned the conversations which I heard.

Q. Did you repeat what you had heard in those conversations to Mr. White?

A. Yes, I did.

(Testimony of Carl T. Rentschler.)

Q. Now, when did the conversations with Mr. White take place—that conversation?

A. Prior to April 30. [24]

Q. Just prior to April 30?

A. Why, between the 20th and the 30th.

Q. Do you recall where those conversations with Mr. White took place?

A. Both of them took place in the street.

Q. And what did you say to Mr. White and what did Mr. White say to you?

A. In the conversation with Mr. White I told him that I understood the L. W. Shop was sold and that since it was sold during the time that we had a listing on it, that he should square up with us regarding the commission involved in the sale and I suggested that he see Mrs. Eagleson.

Q. And what, if anything, did Mr. White say to you?

A. On the first occasion of meeting him he indicated that he would see her in the squaring off of the commission. On the second occasion I saw him was the day before he left for Outside and he was very discourteous and I mentioned that Mrs. Eagleson would like to see him and he said if she would like to see him she had better see him before the next morning because he was leaving.

Q. Did you have any further conversations, or were you present at any conversations with Mr. White? A. No.

Mr. Kay: That is all. [25]

(Testimony of Carl T. Rentschler.)

Cross-Examination

By Mr. Renfrew:

Q. Mr. Rentschler, when you identified the original contract which is offered in evidence, I presume as Plaintiff's Exhibit 1?

The Clerk: Yes.

The Court: Yes.

Q. (By Mr. Renfrew): —you stated that that was signed in your presence by both Mr. and Mrs. White? A. Yes.

Q. I wonder if that contract might be handed to the witness? Did you prepare that document, Mr. Rentschler? A. Yes.

Q. You understood at that time then, did you, that Mr. and Mrs. White owned this business as partners? A. Yes.

Q. And I notice that the one paragraph of the contract states "I agree to make a satisfactory deed and to give clear abstract of title, if so required, showing the title to be fully vested in me."

You knew, did you not, that there was no real estate involved here, but that this was merely a licensed business? A. Yes.

Q. And so that portion of the contract is just surplusage, [26] it didn't mean anything?

A. Yes.

Q. Now this property was listed exclusively with your agency for a period of 60 days, is that correct?

A. Yes.

Q. And the contract was dated July 7, 1948?

(Testimony of Carl T. Rentschler.)

Q. Now, when did the conversations with Mr. White take place—that conversation?

A. Prior to April 30. [24]

Q. Just prior to April 30?

A. Why, between the 20th and the 30th.

Q. Do you recall where those conversations with Mr. White took place?

A. Both of them took place in the street.

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Q. And so that portion of the contract is just surplusage, [26] it didn't mean anything?

A. Yes.

Q. Now this property was listed exclusively with your agency for a period of 60 days, is that correct?

A. Yes.

Q. And the contract was dated July 7, 1948?

(Testimony of Carl T. Rentschler.)

A. Yes.

Q. Correct. Now, what was your interpretation as to when the time expired on that contract?

Mr. Kay: I object to that as irrelevant. The document speaks for itself, sir.

Mr. Renfrew: I can ask him his interpretation of it.

Mr. Kay: Interpretations don't mean anything.

The Court: It seems to me it is immaterial.

Q. (By Mr. Renfrew): Did you feel, Mr. Rentschler, that after September 8, 1948, you had any interest, any exclusive interest, in the sale of those premises? A. Well——

Mr. Kay: I object to it as irrelevant or immaterial.

The Court: I don't get the significance of that date. What is it?

Mr. Renfrew: The contract, as counsel states, your Honor——

The Court: You mean 60 days from the time it is dated? [27]

Mr. Renfrew: Yes.

The Court: I think it is immaterial in connection with the extension.

Mr. Renfrew: I can tie it up with the extension, your Honor, that is what I am intending to do.

Mr. Kay: Whatever the witness felt, I don't see that that has anything to do with this case.

The Court: No, he is not the plaintiff. The objection is sustained.

Q. (By Mr. Renfrew): I will ask you, Mr.

(Testimony of Carl T. Rentschler.)

Rentschler, when you prepared this contract were you acting as the agent for Mrs. Eagleson?

A. Yes.

Q. And did you make the entire negotiation yourself? You stated you wrote the contract; did you make the negotiation with Mr. and Mrs. White?

A. Yes, under the guidance of Mrs. Eagleson.

Q. I think you did state that you knew the Whites were partners at that time?

A. I knew the condition prior to that time; there were three partners and the one was purchased out—was bought out evidently by the other two.

Q. And you knew that Mr. and Mrs. White were partners in the operation of the business?

A. Yes. [28]

Q. Is that why you had them both sign the contract? A. Yes.

Q. You have examined the contract under the word “extension”? There appears a 3 and then a dash and a 23 and above that dash is a 22. Would you state what, if anything, that referred to?

A. That is a notation irrelevant to the contract.

Q. It is written in pencil? A. Yes.

Q. And you wrote it, didn't you? A. No.

Q. Do you know who did? A. No.

Q. There is quite a bit of other writing there in pencil, isn't there? A. Yes.

Q. Did you write that? A. Yes.

Q. And did you write the “Carl” in pencil?

A. No.

Q. Do you know who wrote that?

(Testimony of Carl T. Rentschler.)

A. Mrs. Eagleson.

Q. You don't know what the 3-22-23, stands for?

A. No.

Q. Now, right near that you find "Extension until 4-30-49." [29] Did you understand that to be April 30, 1949? A. Yes.

Q. And did Mrs. White acquiesce in that extension? A. No.

Q. She wasn't there?

A. No, at the time she wasn't there.

Q. Now, from the 7th day of September, 1948, until about April the 8th, 1949, had you attempted in any way to dispose of this property?

A. Yes, I had taken several people through the premises and unless you are instructed by a property owner to——

Q. Just answer the question, if you will.

Mr. Kay: I object to that. Let the witness tell his story.

Mr. Renfrew: The Court has already told me I could object if it is not responsive.

The Court: It is not responsive to the question.

Q. (By Mr. Renfrew): What was your answer with regard to whether or not you made any attempt to sell the property between those dates?

A. Yes.

Q. And during that period of time you had no contract whatsoever, is that correct?

A. Other than this one; none other than this one. [30]

Q. None other than the contract which has been introduced in evidence?

(Testimony of Carl T. Rentschler.)

A. That is right.

The Court: I think we will recess at this time. Court will now be in recess until 2:00 o'clock, p.m.

(Whereupon, at 12:00 o'clock, Noon, the trial was recessed until 2:00 o'clock, p.m. of the same day, February 20, 1950.) [31]

Afternoon Session

The Court: The witness, Rentschler, may resume the stand.

CARL T. RENTSCHLER

called as a witness in behalf of the plaintiff, having previously been sworn, resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Renfrew:

Q. Mr. Rentschler, I understood your testimony before lunch to be to the effect that prior to your request of Mr. White to extend this contract of agency to your firm, which took place I believe you stated about April 8, 1949, as near as you can recall; you had some other prospects on your prospective list of potential purchasers of his and Mrs. White's business, is that correct?

A. Would you please restate your question? It was too lengthy. I couldn't follow it, Mr. Renfrew.

Q. Prior to lunch it was my understanding from your testimony that you stated you had some prospects or suspects for the sale of Mr. and Mrs.

(Testimony of Carl T. Rentschler.)

White's business, before you went to see him in April, when you asked for an extension of contract of agency, is that correct?

A. Yes, that is correct.

Q. And am I correct in my recollection that you stated [32] that it was about April 8, 1949, when you went to see him to ask for an extension of your contract?

A. Yes, that is correct.

Q. And at that time you had some prospects for the sale of the place of business?

A. Yes.

Q. Did you ever have a prospect that you took over there to show that place of business to that ever made you an offer?

A. No.

Q. And the man who subsequently bought the place, Mr. Pickering, did you ever have any conversation with Mr. Pickering?

A. No, I was told not to.

Q. Yes, I understood you to testify that Mr. White told you not to, but that was not my question. Did you ever have a conversation with him?

A. No.

Q. Did you know who he was?

A. Yes.

Q. Did you know him before you went over there on about April 8th?

A. No.

Q. Then it was not as a result of any thoughts about a sale to Mr. Pickering that you went there on April 8th? [33]

A. No.

Q. But you did have some other prospects in mind?

A. Yes.

Q. And on the strength of those other prospects that you had in mind you state that Mr. White gave

(Testimony of Carl T. Rentschler.)

you a continuation of your contract until and including April 30, 1949? A. Yes.

Q. Now, were you or were you not able to make a sale of those properties to any of those people that you had as a prospect? Yes or no?

A. No.

Q. Now, you likewise stated, according to my recollection, that you took somewhere in the neighborhood of ten people through the place of business—I suppose we refer to White's candy shop—to view it? A. Yes.

Q. Did you ever notify Mr. White of these prospects that you had? A. Oh, yes.

Q. Was he there when you took them through?

A. Yes.

Q. Now, was that prior to your arrangement of April 8, or after your arrangement of April 8?

A. I can't recall on that.

Q. Well, could you recall who these people were? [34] A. Yes.

Q. Will you do so?

A. Do you want the entire ten that I refer to?

Q. Yes, I want the entire ten that you took over there to the place of business.

A. There is a Mr. Urand, Mr. Michaels, a Mr. Edward Nowley——

Q. All right——

A. Mr. Edward Whaley.

Q. All right. A. Mr. McCollough.

Q. All right.

A. Mr. Osborne, Mr. Hudson.

(Testimony of Carl T. Rentschler.)

Q. All right. A. Mr. Herrick, Mr. Hall.

Q. Mr. Hall? A. H-a-l-l, Mr. Olivera.

Q. Now, you are reciting those names from some record you have there? A. Yes.

Q. What is the record?

A. The record is the daily book that the office keeps of all contacts in the office or outside of the office, listed by the day.

Q. All right then, with a certain amount of re-search you [35] could tell us what day you took those people over there, couldn't you?

A. Yes.

Q. I won't ask you to do this on the witness stand. You have that ability and you will be able to supply that information to us as to when you took those people over there?

A. I don't know that I can get exactly the day; I have notations that I contacted these people on the certain day that the notation was made here in the book. Whether or not it was done that evening or the next day is another question.

Q. Within 24 or 48 hours you could tell?

A. Uh huh.

Q. And your book I suppose would state whether or not you took them over to the place of business?

A. No, not necessarily.

Q. What record do you have that you took Mr. McNalley over to the place of business?

A. My own recollection.

Q. And is that true of all the other nine?

A. Yes.

(Testimony of Carl T. Rentschler.)

Q. You have distinct recollections of each particular time that you went over there?

A. Yes.

Q. Now, with that as a help, can you tell us whether or [36] not these ten resulted as prospects after your agreement of April 8 or prior to April the 8th? A. Both.

Q. Both. Then would you say that some of those ten were within 60 days of the time that you secured your listing of this property in July of 1948?

A. Yes.

Q. And how many of them would you say were after the April the 8th arrangement between you and Mr. White? A. Off hand, about three.

Q. About three. And were they the prospects that you had in mind at the time you asked for the extension? A. Yes.

Q. Now, on your direct examination this morning, I believe you used the word "coerce" once in reply to one of your counsel's questions. Do you recall whether or not you used that word?

A. Yes, I believe I did.

Q. And I gathered from your answer that you stated in substance that Mr. White and you had agreed to coerce Mr. Pickering into buying the premises? A. That is correct.

Q. Now, I wonder if you would elaborate on that just a little bit for us? Just how did that theory come into your mind? [37]

A. Well, as I stated this morning, it was made known to me by Mr. White that this Mr. Pickering

(Testimony of Carl T. Rentschler.)

was negotiating with Mr. White to purchase the L. W. Shop.

Q. Yes?

A. And as I stated before, he suggested that were I to get a prospect who would be made to appear very interested in the purchase, it might persuade or coerce Mr. Pickering into coming up the additional amount of money that was desired by Mr. White.

Q. Before you go any farther, what did Mr. White tell you was the amount Mr. Pickering had offered for the premises?

A. This morning I stated I couldn't remember that.

Q. Well, do you remember it this afternoon?

A. No, I won't say that I can.

Q. Well now, you distinctly recall a conversation, however, in which he said in substance, "If you can produce somebody who is interested in this property maybe that will increase Mr. Pickering's offer to where I can sell it to Mr. Pickering." Is that the idea?

A. And pay the commission.

Q. In other words, if you were able to produce somebody who would bring Mr. Pickering's offer up to \$45,000.00 you were to get a commission on the sale, is that your understanding? [38]

A. Definitely.

Q. You weren't able, were you, to produce anybody that even made an offer of \$12.90 for the place?

A. No.

Q. Now, I understood likewise this morning

(Testimony of Carl T. Rentschler.)

when you stated that you had two conversations with Mr. White on the streets of Anchorage—Do you recall making that statement? A. Yes.

Q. Would you care to make a statement now as to when that was that you had this conversation with Mr. White?

A. Well, the first conversation——

Q. The time I am interested in.

A. The time during the day?

Q. Yes. If you can place it with that degree of certainty I will be more than pleased.

A. What is your question?

Q. What was the time, relative to the month, day, or as close as you can get it?

A. The first conversation was on or about the 20th of April.

Q. The 20th of April. Now I will ask you, did you not state this morning that your first conversation was about April 30th? As near as you can recall it? A. No, I didn't.

Q. You didn't state that? [39] A. No.

Q. Now, I will ask you how you place it as April 20th?

A. There are certain other events that occurred right around that date that leads me to place it that particular day.

Q. Will you give us the benefit of what you mean by "certain other things"?

A. "Certain other things" that I referred to was that I was told about that date that someone con-

(Testimony of Carl T. Rentschler.)

versed with Mr. White and he made the statement——

Mr. Renfrew: All right now, I don't want you to——

Mr. Kay: Go ahead, Mr. Rentschler. All right, I will withdraw that.

Mr. Renfrew: Your Honor, I have asked him how he knows and he says "by certain other things"; he doesn't say that someone told him. Counsel knows that he can't repeat hearsay.

Mr. Kay: He knows that, too, and that is what he is trying to avoid.

The Court: It is hard to say as to whether his answer would be predicated on personal knowledge or would merely recite hearsay.

Mr. Renfrew: Do you understand, Mr. Rentschler, that you cannot testify as to what someone else told you if it wasn't said in the presence of the defendant? [40]

The Witness: Yes.

Q. (By Mr. Renfrew): Calling your attention to the fact that the reason you recall this as being about the 20th of April was due to the fact that you had a conversation with someone else, is that your answer? A. Yes.

Q. You had a conversation with someone else that makes you know it was about the 20th of April? A. Yes, relative to the case.

Q. How did you know that this conversation with this other person was about April 20th?

A. Because I can remember back that far.

(Testimony of Carl T. Rentschler.)

Q. Is that your answer, that the only reason that you pick April 20th instead of April 30th is because you can remember back that far?

A. I said on or about April 20.

Q. Well, could it have been April 30?

A. No, sir.

Q. Could it have been April 10?

A. No, sir.

Q. But you are positive, then, that it was April 20? A. No, on or about April 20.

Q. Would you give it just a 24-hour leeway one way or the other? [41] A. No.

Q. How much on either side, then, would you give it?

A. About a three day leeway either side.

Q. It might be as late as the 23rd or as early as the 17th of April? A. That is right.

Q. Do you have any means, any notes or anything that you can refer to as to why you put it within that six day period from the 17th day of April to the 23rd, 1949? A. No.

Q. None at all? A. None at all.

Q. It is just that you know that it happened during that period of time? A. Yes.

Q. Well, all right, will you elaborate a little on the conversations that you had. Maybe it will help you if you can remember where it took place. Where did it?

A. The first conversation with Mr. White?

Q. The conversation that took place either sometime that you are positive of now between the

(Testimony of Carl T. Rentschler.)

17th day of April, 1949, and the 23rd day of April, 1949, that conversation, the one you have just been talking about? A. On the sidewalk?

Q. On the sidewalk. [42] A. Yes.

Q. What sidewalk? A. 4th Avenue.

Q. All right, in Anchorage, I presume?

A. Yes.

Q. And could you locate it any closer than just on 4th Avenue? A. I don't believe so.

Q. You don't know whether it was down in front of the Anchorage Grill or up in front of the NC Company or by the bank? A. No.

Q. Just you know that it happened in Anchorage on 4th Avenue? A. Yes.

Q. And you have a distinct recollection of that?

A. Yes.

Q. It couldn't have been on 5th Avenue?

A. No.

Q. And yet you can't tell us where on 4th Avenue it was?

A. I would say it was west of F Street.

Q. West of F Street; well, now, may I ask what causes you to say that it was a little west and not a little east?

A. Mr. White's place of business happens to be in that locality and he was normally seen in that locality. [43]

Q. Well, all right, now did you go over to his place of business and see him? A. No.

Q. What? A. No.

Q. But you think it must have been in that lo-

(Testimony of Carl T. Rentschler.)

cality because that is where his place of business was? A. Yes.

Q. It couldn't have been down where he gets his hair cut, could it? A. No.

Q. Or perhaps where he gets gas for his automobile? A. I don't remember.

Q. Who was with you when you had this conversation? A. No one.

Q. What time of the day was it?

A. Don't recall.

Q. Was it daylight or dark?

A. I believe it was daylight.

Q. When you say "believe" why do you believe that?

A. Because I usually work during the day.

Q. You don't work anytime after six o'clock?

A. Oh, yes.

Q. Were you working when this happened or was it just a casual—— [44]

A. No, I was working.

Q. How do you remember that you were working and it wasn't just a casual bump into?

A. Well, normally I am usually at home evenings.

Q. Well, could this have been something that wasn't normal? A. It may have.

Q. Could this have taken place at night?

A. No, I don't believe so. I recall it during the day—during the working hours.

Q. You recall it was during the day during working hours? A. Yes.

(Testimony of Carl T. Rentschler.)

Q. Do you recall what kind of a day it was?

A. No, I don't believe I can.

Q. You don't recall whether the sun was shining, it was raining or snowing? A. No.

Q. Now, then, do you recall the conversation?

A. Yes, to a certain extent.

Q. That will help us a lot. Tell us what you said to Mr. White?

A. That I had received information that the property was sold.

Q. Is that what you said to him?

(No response.) [45]

Q. I asked you—my question is—What did you say to Mr. White?

A. "I understand that your place was sold, Mr. White."

Q. What did Mr. White say to you?

A. I think he denied it.

Q. All right, is that the substance of what was said in that first conversation? A. Yes.

Q. All right, when did you have another conversation with him?

A. It was on or about the end of the month.

Q. Well, on or about the end of the month, there is 30 days in April?

A. You should be able to place the day before Mr. White left for outside.

Q. I beg your pardon?

A. The day before Mr. White left for outside was——

(Testimony of Carl T. Rentschler.)

Q. —when you had the conversation with him? A. Yes.

Q. Would you be satisfied with that; do you know that he left the next day after your conversation? A. Yes.

Q. You know that? A. Yes.

Q. If Mr. White left here on the 16th of May then you [46] would be willing to agree that it was a day or two before that? A. Oh, no.

Q. You have got to stick with what you tell me or it won't do me any good to find out when he left here.

A. The day before Mr. White left prior to being served a subpoena to appear here at Court.

Q. The day before Mr. White left? Would you state what you mean by your answer, I don't follow that, what was your answer now, you had this conversation the day or two before he was served a subpoena to appear here in Court?

A. The day before.

Q. The day before he was served the subpoena?

A. Yes—summons. Do you have the file, that will show when the subpoena was served.

Q. The complaint shows that this case was filed on the 6th day of May, 1949. Now, the subpoena couldn't have been issued before the case was filed so it must have been on the 5th, not earlier than the 5th of May that you had the second conversation, is that correct? A. No.

Q. Well, when was it, then?

A. On or about the 30th of April.

(Testimony of Carl T. Rentschler.)

Q. Now, what places it in your mind as on or about the 30th of April? [47]

A. Mr. White had made some visits to the office on or about that date and the conversation took place on or about that date.

Q. Now, this second conversation took place where? A. On the street.

Q. On the street?

A. Yes, and that was in front of Sunshine Market.

Q. Now you say the way you place it on or about the 30th day of April was because he had made some previous visits to your office?

A. Yes.

Q. When had he made previous visits to your office? A. Shall I check my record?

Q. Yes if it will help you to answer it.

A. Well, I would say it was five days on this side of April 30 and four days on that side of April 30.

Q. In other words it would have to be either sometime between the 25th of April and the night of the fourth of May? A. Yes.

Q. You wouldn't quite get that down as close as you did the first conversation of six days—you want nine days on this one?

A. Yes, it has been almost two years ago.

Q. It is remarkable that you can remember it that period of time, Mr. Rentschler. [48]

A. Yes.

Q. Now then this conversation took place in

(Testimony of Carl T. Rentschler.)

front of the Sunshine Market, you remember that distinctly? A. Yes, very.

Q. Who was present? A. Mr. White.

Q. And yourself? A. Yes.

Q. No one else? A. That is correct.

Q. Was it a casual bump-into-conversation?

A. I was looking for him.

Q. You were looking for him?

A. Yes.

Q. In the Sunshine Market?

A. No, in that neck of the woods.

Q. Let's see, where was the Sunshine Market with relationship to the L. W. Candy Shop?

A. It is practically on the same corner but across the street.

Q. In the same block?

A. No, not in the same block.

Q. Is it farther west?

A. Yes, it is farther west.

Q. And across the street? [49] A. Yes.

Q. Were you making a systematic search of the town for him? A. Yes.

Q. And had you been to his place of business?

A. Yes.

Q. And how did you happen to go on up that way? Did someone direct you up that way?

A. No, I saw him.

Q. You saw him? A. Yes.

Q. Was he walking along the street?

A. Yes.

(Testimony of Carl T. Rentschler.)

Q. What time of the day was it?

A. I believe it was about eleven o'clock in the morning.

Q. About eleven o'clock in the morning. Now, tell us what that conversation was, what took place there; what did you say to Mr. White when you met him?

A. I said, "Mr. White, I understand your business is sold."

Q. Had you——

A. He had negotiated with Mrs. Eagleson regarding——

Q. Just a minute, I am asking you what you said to Mr. White and what he said to you and not anything else because it is not admissible. [50]

A. I said to Mr. White, "Don't you think you had better come over to the office and square up with the commission?"

Q. Uh huh.

A. And he said, "No." I said, "You realize you are obligated to, don't you?" and he said, "No."

I said, "Well, Mrs. Eagleson would like to see you before you leave town—." No, I am wrong in that. I said, "Mrs. Eagleson would like to see you" and he said, "Well, she had better see me before tomorrow morning because I am leaving."

The entire conversation was rather short.

Q. And in general now you have stated what the entire conversation was? A. Yes.

Q. In substance you asked him to make a pay-

(Testimony of Carl T. Rentschler.)

ment and he said, "I don't owe you anything." Is that the idea? A. Yes.

Q. And you referred to Mrs. Eagleson and he said, "If she wants to see me she will have to see me before I leave town." A. Yes.

Q. You only had two conversations with him that you referred to, that you had on the street?

A. Regarding what, Mr. Renfrew? [51]

Q. You testified this morning you had two conversations with him after—I thought you said April 30 this morning, but I am willing now to limit it to the time——

A. Let's make it April 8.

Q. All right. After you went over and got an extension until the end of April? A. Yes.

Q. ——on your contract. You had two conversations with him after that on the street, isn't that true?

A. We just limited that it might be a little bit over the month a while ago, the second conversation.

Q. But you only had two conversations with him? Just two?

A. I won't say that I only had two.

Q. Do you remember now having any more?

A. No.

Q. Then were these the two conversations that you referred to when you testified for Mr. Kay this morning? A. That is right.

Q. The two that you have just related now?

A. Uh huh.

(Testimony of Carl T. Rentschler.)

Q. Is that correct? A. Yes.

Q. This morning did you not testify that when you had the first conversation with him that he indicated to you [52] that he would go over and settle up with Mrs. Eagleson? Did you not state that on this witness stand this morning?

A. I don't believe I did.

Q. You don't believe you said that?

A. No.

Q. If you did say it this morning were you erroneously stating it? A. No.

Q. Well, did he say, "I will go over and pay Mrs. Eagleson"? A. I don't recall.

Q. Now as a matter of fact for me a moment ago he denied even selling it at the first conversation. Do you remember that far back?

A. Yes.

Q. And isn't that the truth that he did deny that the place was sold? A. Yes.

Q. Then he couldn't have said, "I will go over and settle up with Mrs. Eagleson," could he, or even implied it or inferred it as you said this morning, if you did say that?

A. That is right.

Q. He couldn't have done anything like that?

A. That is right. [53]

Q. And on the second conversation he definitely told you that he didn't owe her anything, isn't that right? A. That is right.

Q. On no conversation that you had with him that you referred to this morning did he imply that

(Testimony of Carl T. Rentschler.)

he would go over and settle with her, is that your testimony now? A. That is right.

Mr. Renfrew: I wish to excuse the witness, Your Honor, with one point. I would like to have him if possible to arrange for me where I could recall him and have him state the dates according to his books. I think he said he could during a twenty-four hour period as to when he took these ten customers through this establishment.

The Court: You may recall him for that purpose.

Mr. Kay: Could I ask an additional question on redirect?

Redirect Examination

By Mr. Kay:

Q. Mr. Rentschler, these two discussions with Mr. White that Mr. Renfrew has been questioning you about, on the first of those conversations that would be the one somewhere in the vicinity of April 20, did you request Mr. White to see Mrs. Eagleson at that time, to the best of your recollection?

A. No, I don't believe so.

Q. Do you know whether or not Mr. White did see Mrs. [54] Eagleson prior to the second conversation? A. I understand he did.

Mr. Refrew: I object to that now as a conclusion.

Q. (By Mr. Kay): You don't know that of your own knowledge? A. No.

Mr. Renfrew: That is all, Mr. Rentschler. Thank you.

(Witness excused.)

Mr. Kay: I will call Wendell Dayton.

WENDELL DAYTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your name, please, Mr. Dayton? A. It is Wendell Dayton.

Q. And where do you live, sir?

A. In Spenard.

Q. Are you employed here in the City of Anchorage, Mr. Dayton? A. Yes, I am.

Q. And what is the nature of your occupation, sir?

A. I am an office equipment repair man for Snyder Office Supply. [55]

Q. Are you acquainted with Mr. Lawrence White, the defendant in this case—the gentleman sitting over at the table there? A. Yes, sir.

Q. Mr. Dayton, I will ask if you recall having any conversation with Mr. White in the month of April, 1949—that is, last April, sir?

A. I probably had a lot of conversations with Mr. White during that period.

Q. Well, do you recall specifically any conver-

(Testimony of Wendell Dayton.)

sation with him relative to a sale of the Chocolate Shop? A. Yes, I do.

Q. Now, Mr. Dayton, can you place the approximate date of that conversation to the best of your ability, sir?

A. I would say it was some time between the 15th and the latter part of the month.

Q. That would be the month of April, 1949?

A. That is the month of April.

Q. And where did that conversation take place if you recall?

A. In the Candy Shop, at the counter.

Q. Would you state, Mr. Dayton, just what you said to Mr. White and what he said to you to the best of your ability to recall, sir?

Mr. Renfrew: Was any one present? I would like to [56] know who was present at this conversation.

The Court: Well, of course, that would have to be stated—the time and circumstances and the persons present if it was the case of laying the foundation for an impeachment, but it doesn't have to include those details on an examination of this kind for another purpose.

Of course you may go into that.

Mr. Renfrew: I understand that. I was just trying to save time. It is all right.

Q. (By Mr. Kay): If anyone else was present, Mr. Dayton, will you state it to the best of your recollection?

(Testimony of Wendell Dayton.)

A. I don't recall but I think my wife was with me at the time.

Q. Well now, anyone else that you can think of?

A. No, I don't recall anyone else.

Q. Would you just state in your own words, Mr. Dayton, what that conversation was to the best of your ability?

A. I noticed some new faces in the shop and I asked Mr. White if that was his new helper and the conversation got around that he said he was selling it to those people—to the new face in there.

Q. And was anything else said as far as you can recall?

A. Oh, I think we talked around about what he was going to do and things like that, but I don't recall exactly. [57]

Mr. Kay: No further questions.

Cross Examination

By Mr. Renfrew:

Q. Mr. Dayton, you can't place this conversation within a day or two one way or the other, can you? A. No, I couldn't.

Q. It may have been any time from the middle of April to the first week in May, couldn't it?

A. Possibly. However, I think it was still in the month of April.

Q. And do you have any particular reason to believe why it was still in the month of April instead of in the first week of May?

(Testimony of Wendell Dayton.)

A. Off hand, no.

Q. And the conversation, the gist of it was that you inquired into the strange faces and he said I am going to sell or I am selling my business to these people?

A. Yes.

Q. He didn't say, "I have made a sale and I am on my way Outside and the contract is signed." Did he?

A. No.

Mr. Renfrew: That is all, Mr. Dayton, thank you.

Redirect Examination

By Mr. Kay:

Q. Did he say anything, Mr. Dayton, to indicate that [58] they had bought the place or were buying the place?

A. He indicated that he was selling it to them. He didn't indicate that they had made a contract or anything else of that sort.

Q. Had you noticed those faces around there for some time, Mr. Dayton?

A. Yes, I had.

Q. What was that answer?

A. I had noticed those faces in there from time to time prior to this conversation with Mr. White.

Q. And for about how long had you noticed these people could you say?

A. I would say about two weeks, possibly more.

Q. And are you sure in your own mind that this was before the first of May, Mr. Dayton?

A. Yes, I am.

Mr. Kay: That is all.

(Testimony of Wendell Dayton.)

Recross-Examination

By Mr. Renfrew:

Q. Maybe I misunderstood you. Didn't you say when you came in you noticed some strange faces in there and that is what caused you to make an inquiry?

A. That was the first time I had had a chance to talk to Mr. White about those strange faces.

Q. And had it been preying on your mind for about three [59] weeks?

A. I don't pry into other people's business but Jim and I had always been on good terms and had done a lot of talking. I had noticed when he had changes of personnel in there.

Q. I understand that. Now, could I understand your testimony in substance to be that you had seen these strange people in there for two weeks or longer? A. Yes.

Q. But this is the first time you had gotten around to asking him about these strange people?

A. Yes.

Q. And you were friendly with him and talked over his business affairs with him, did you?

A. Not particularly talked over his business affairs.

Q. Well, his employees?

A. (No response.)

Q. His employees, did you talk about them?

A. Might make a comment about them being a new one in there.

(Testimony of Wendell Dayton.)

Q. And you had done that before I suppose?

A. Yes.

Q. You frequented the place, didn't you?

A. Yes, I was in there quite a few times.

Q. Weren't you in there several times a week?

A. Yes.

Q. And yet you are definitely able to state that this took place between the 15th day of April and the last day of April? A. Yes.

Q. And it couldn't have been three or four days in May? A. No.

Q. All right. Why?

A. That I just can't answer.

Q. By any chance are you buying any property through Mrs. Eagleson now? A. No.

Q. Did you—— A. No.

Q. Well, how did you happen to be here to testify? A. I was called by Mrs. Eagleson.

Q. How did Mrs. Eagleson know about this story?

Mr. Kay: She will be glad to tell me when she gets on the stand.

Q. (By Mr. Renfrew): Will you answer that question? How did Mrs. Eagleson happen to know about this if she called you?

A. That I don't know. I was rather surprised at the time that she asked me if I would testify. I was wondering [61] how she got ahold of my name for it.

Q. Did she ask you if you would testify that you overheard or had a conversation with Mr. White

(Testimony of Wendell Dayton.)

in which you heard Mr. White remark to you that he was selling his place of business to certain people? Did Mrs. Eagleson ask you that?

A. Yes.

Q. And you said that you would? A. Yes.

Q. Now did she tell you to be sure that it was between the 15th of April and the 30th of April?

A. No.

Q. How did she know that you had overheard this conversation or that you had had such a conversation with Mr. White? How did she know that? A. That I don't know.

Q. A little bird must have told her?

A. I wouldn't put it that way.

Q. Did you tell her? A. Not personally.

Q. Well, did you know Mrs. Eagleson before she called on you to be a witness in this case?

A. Yes.

Q. Did you not testify a moment ago that you were surprised when Mrs. Eagleson called you, that you wondered [62] how she got your name? Didn't you just testify that?

A. I just testified that, yes.

Q. You weren't surprised, were you, because you already knew her?

A. Sure, I already knew her but I was surprised that she knew of the conversation that I had with Mr. White.

Q. Oh, and you don't know how she found out about that conversation? A. No.

Q. She never told you? A. No.

(Testimony of Wendell Dayton.)

Q. Did you ever talk about this with your wife?

A. Why, I presume I did.

Q. Do you know whether your wife was with you or not? A. Off hand, no.

Q. But you are surprised when Mrs. Eagleson called you in and knew your name and knew that you had had such a conversation? You were surprised at that? A. Yes.

Q. But you weren't sufficiently surprised to ask her, "Mrs. Eagleson, how in the world did you ever find out I had such a conversation?" You weren't that surprised, were you? A. No.

Q. Can you give us, now, after thinking this thing over, [63] Mr. Dayton, any reason why you know this conversation which you had took place not later than April the 30th?

A. Off hand, no.

Q. Well, if you can think up one let us know after a while, will you? That is all.

Further Redirect Examination

By Mr. Kay:

Q. Mr. Dayton, how long have you known Mrs. Eagleson? A. Since the summer of '48.

Q. How long have you known Mr. White?

A. I——

Mr. Renfrew: We object to this as immaterial and irrelevant——

Mr. Kay: You are trying to show——

(Testimony of Wendell Dayton.)

Mr. Renfrew: Just a minute, I am making an objection.

The Court: You will have to give the Court time to speak.

Mr. Renfrew: That is what I was trying to do without his interruption.

Mr. Kay: I just wanted to know how long he had known Mr. White.

The Court: Objection overruled.

Q. (By Mr. Kay): You may answer.

A. I have known Mr. White since '46. [64]

Q. Are you any better friend of Mrs. Eagleson than you are of Mr. White?

Mr. Renfrew: I object to that as immaterial, irrelevant——

The Court: It goes to the witness interest in the case after your examination.

Mr. Renfrew: It is his witness and it is a self-serving declaration.

The Court: But your examination of him would tend to throw light or tend to show, perhaps, an interest because of his relationship to that of the plaintiff, so the objection is overruled. It is all a point of interest.

Mr. Renfrew: Your Honor, I don't wish to argue with the Court but I will submit to the record that the only question I asked him was how long he had known Mrs. Eagleson in response to his statement that he was surprised that she got his name which he clarified.

The Court: As a matter of fact you questioned

(Testimony of Wendell Dayton.)

him about practically whether or not it was suggested to him what he should testify, so that makes the examination of this kind now proper. *Examination* is overruled.

Q. (By Mr. Kay): You may state the answer.

A. I have always considered Jim a friend of mine as well as Mrs. Eagleson. [65]

Q. By "Jim" you mean Mr. White?

A. Yes.

Q. Did anyone suggest to you in any way what your testimony was to be in this case? A. No.

Q. Attempt to put any words in your mouth?

A. No.

Further Recross-Examination

By Mr. Renfrew:

Q. Well now, when did you first talk this case over with Mr. Kay?

A. First conversation with Mr. Kay was just prior to court time.

Q. Today? A. Yes.

Q. And when did you first talk it over with Mrs. Eagleson? A. When she first called on me.

Q. All right. When was that?

A. That I don't recall. It was after the sale of the place, I presume, when she was interested in securing witnesses.

Q. Roughly would you say it was in December, 1948, or was it in January, 1949, or was it in July of '49?

(Testimony of Wendell Dayton.)

A. Well, as nearly as I can recall, it must have been [66] in May of '49.

Q. In May of '49? A. Yes.

Q. Did you write down what you told Mrs. Eagleson at that time? A. No.

Q. And have you talked with her since May about it?

A. Yes, I have had other conversations with her about it.

Q. How many times?

A. Two times, I think.

Q. Do you remember when those two times were? Was that exclusive of the one in May or two besides the one in May?

A. Two besides the one in May.

Q. Do you remember when those other two were?

A. One was this month sometime and one later on, the latter part of last year, possibly November or December.

Q. November or December and then one this month? A. Yes.

Q. Now during all three of those conversations that you had you have steadfastly maintained that this conversation you had was not earlier than the 15th of April and not later than the 30th of April?

A. Yes. [67]

Q. Well, I will ask you once more now, can you remember why it couldn't have been on the first—the second of May? A. No, I can't recall.

Mr. Renfrew: That is all.

Mr. Kay: That is all.

(Witness excused.)

The Court: Unless your next witness is short, we will take a recess at this time.

Mr. Kay: I was going to suggest we take a recess now.

(Short recess.)

The Court: You may proceed.

Mr. Kay: I would like to call Mr. Rodney Johnston.

RODNEY L. JOHNSTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Johnston, would you state your name, please, and your occupation?

A. Rodney L. Johnston, cashier at the Bank of Alaska.

Q. And how long have you been cashier there, sir?

A. About two years.

Q. Mr. Johnston, do you have with you on return of our subpoena a copy of the contract between Lawrence White and [68] Mr. Pickering covering the sale of the L. W. Chocolate Shop?

A. Yes, I have.

Q. From whom did you receive that contract, if you know, sir?

A. I was not the officer that handled the escrow

(Testimony of Rodney L. Johnston.)

to my knowledge so I don't know which officer of the bank received the escrow.

Q. You don't know of your own knowledge how the contract came to be in the bank, do you?

A. No, I do not know that.

Q. Was it in the bank and do the records in the bank reveal that it was received by the bank in the ordinary course of business?

A. That is right, yes.

Q. And is the contract now held in escrow by the Bank of Alaska? A. Yes, sir.

Q. Are you familiar with the signatures of any of the parties to that contract?

A. Yes, I believe I recognize the signatures.

Q. Is it signed by Mr. Lawrence A. White. Do you recognize his signature? A. Yes, sir.

Q. Do you recognize the signature of Mr. Pickering? [69] A. Yes, I do.

Mr. Renfrew: Do you intend to offer it in evidence?

Mr. Kay: I do. I would like to offer it in evidence at this time, Your Honor. However, it is a part of the records of the bank and I would like to ask that that we be permitted to copy the contract and return the original to the bank immediately.

The Court: That may be done.

Mr. Renfrew: May I have just a moment here? Maybe we can save some time, Your Honor. May I inquire one or two questions of the witness?

The Court: Yes.

(Testimony of Rodney L. Johnston.)

Mr. Renfrew: By whom is that contract notarized?

The Witness: Catherine Brundage.

Mr. Renfrew: You are familiar with her signature?

The Witness: Yes.

Mr. Renfrew: Is that the official signature of Catherine Brundage?

The Witness: I would say it was.

Mr. Renfrew: And her notarial seal is affixed?

The Witness: It is.

Mr. Renfrew: And the contract is signed under seal?

The Witness: It is.

Mr. Renfrew: I have a copy of that contract if you wish to compare it and if it is satisfactory you can introduce [70] this one and if you like have the bank keep their own.

The Court: You say it is a carbon of the original?

Mr. Renfrew: I say it is a carbon copy of the original. It is our office copy of the contract.

The Court: There is no necessity of comparing it. It is made by the same process, isn't it?

Mr. Renfrew: Well, frequently, Your Honor, as the Court well knows, in practicing law we leave certain blanks. For instance, the dates, and sometimes the copies do not show the signatures because when you make up the copy of the contract we don't know who is going to sign it or who is going to be the witnesses.

(Testimony of Rodney L. Johnston.)

I would like to have Mr. Johnston compare the dates and the signatures of the witnesses and the signatures of the parties with the original so that it will be a true copy.

The Court: Well, if he can make that comparison in a short time. It is not easy for one person to make a comparison.

Mr. Renfrew: I think that can be done in one minute, Your Honor, it is just the dates.

The Court: If he can do it, very well.

The Witness: I couldn't tell whether it was an exact copy without reading the whole thing. [71]

Mr. Kay: Is the date the same, the filled in blanks?

The Witness: The date of the contract is dated the first day of May, 1949.

The Court: You can tell where each paragraph ends on each page and whether it occupies the same relative position on the copy.

The Witness: I would say it was a copy.

Mr. Renfrew: I will ask you to state if the dates and the signatures of the witnesses are the same?

The Witness: Yes.

Mr. Renfrew: I am willing that counsel may introduce our office copy of the contract providing we may have it back at the close of the case.

Mr. Kay: It is satisfactory to me, Your Honor.

The Court: With one provision and that is that it shouldn't be surrendered if there should be any appeal or any likelihood of an appeal.

(Testimony of Rodney L. Johnston.)

Mr. Kay: If there is an appeal we can stipulate to provide a copy.

The Court: Very well, it may be admitted, then, on that understanding, as Plaintiff's Exhibit No. 2.

(Contract referred to admitted in evidence as Plaintiff's Exhibit No. 2, Witness Johnston.)

PLAINTIFF'S EXHIBIT No. 2

Agreement of Sale

This Agreement, made and entered into this 1st day of May, 1949, by and between

Lawrence A. White and Erma R. White, his wife, of Anchorage, Alaska, the parties of the first part, (hereinafter called the "Sellers"), and

Herbert E. Pickering, of the same place, the party of the second part, (hereinafter called the "Buyer").

Witnesseth:

That for and in consideration of the sum of Six Thousand (\$6,000.00) Dollars, lawful money of the United States of America, to the Sellers in hand paid by the Buyer concurrently with the execution of this agreement, the receipt of which is hereby acknowledged, and in consideration of the further sum of Twenty-nine Thousand (\$29,000.00) Dollars, in like lawful money, to be paid to the Sellers by the Buyer as hereinafter provided, the Sellers agree to sell to the Buyer, and the Buyer agrees to buy of

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

and from the Sellers all that certain personal property and business situated at Anchorage, Third Judicial Division, Territory of Alaska, and more particularly described as follows, to-wit:

That certain business heretofore operated by the Sellers and known as the L-W Chocolate Shop and Fountain, including, but not limited to, all the stock-in-trade, merchandise, equipment, supplies, furniture, fixtures, and all other assets of such business, and including particularly the unexpired portion of the lease covering the premises upon which the business is conducted, hereinafter more fully provided.

The Sellers are particularly excluding from this sale, cash on hand and in banks and accounts receivable as of the close of business, April 30, 1949. The Sellers likewise are excluding from this sale the trade name of the business as is hereinafter more fully set forth.

Together with all the accessories and appurtenances thereunto belonging or in anywise appertaining.

It is agreed that the total purchase price to be paid by the Buyer to the Sellers for the above described property is the sum of Thirty-five Thousand (\$35,000.00) Dollars, of which the sum of Six Thousand (\$6,000.00) Dollars has been paid concurrently with the execution of this agreement, as above set forth, and the Buyer agrees to pay the balance of Twenty-nine Thousand (\$29,000.00) Dol-

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

lars as follows: Five Hundred (\$500.00) Dollars, plus interest as hereinafter provided on the 20th day of June, 1949, and a like sum of Five Hundred (\$500.00) Dollars, plus interest as hereinafter provided, on or before the 20th day of each and every month thereafter until the total unpaid balance, together with such interest, shall have been paid in full. The Buyer agrees to pay interest to the Sellers on the actual unpaid balance due from time to time at the rate of 6% per annum, interest accrued to each monthly payment being payable monthly at the same time and place as payments on the principal are to be made, and in addition to the principal payments of \$500.00 per month. All payments of principal and interest are to be made to the Bank of Alaska, Anchorage, Alaska, for the account of the Sellers.

The Sellers specifically agree that the Buyer may make any payment in addition to the sum of Five Hundred (\$500.00) Dollars per month, plus interest, any time that he may wish so to do, and agree that the Buyer shall have the privilege of paying any part or all of the unpaid balance due to the Sellers at any time, so long as he pays to the Sellers at least Five Hundred (\$500.00) Dollars per month, plus accrued interest, as above provided.

It is agreed that the Buyer has made arrangements with the owner of the business premises for the owner's consent to the assignment of the lease and for an extension of the term, and the Sellers

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

are to perform their obligations in connection with the lease by assignment of the same to the Buyer. From the date of assignment of the lease the Buyer agrees to save and hold the Sellers harmless as against any loss or liability in connection with the lease except in the event the Sellers retake the property because of default by the Buyer as hereinafter provided.

It is specifically agreed that title to the above described property and the whole thereof shall remain in the Sellers until the entire purchase price shall have been paid, and until that time, the Buyer shall have no right to sell, transfer, assign or otherwise to dispose of or attempt to dispose of the property herein concerned.

It is specifically understood and agreed that said property is free and clear of all liens and encumbrances, and that the Sellers will pay any and all outstanding liabilities and accounts payable of the business above described, and hold the Buyer harmless against the same. The Buyer agrees that he will save the Sellers harmless as against any loss or liability in connection with any of such obligations or liabilities of the business incurred after April 30, 1949, including the price of goods now on order but not yet received.

Sellers and Buyer agree that the Sellers are not selling the trade name of the business, but the Buyer shall have the right to use the trade name until notified by the Sellers that they wish to use said

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

name for a period of six months after he has been notified by the Sellers that they do desire to resume the use of such trade name.

The Buyer shall be entitled to the possession of the above described property from the 1st day of May, 1949, and for so long a period of time as he shall keep all the covenants and agreements on his part herein agreed to be kept and performed, but should the Buyer default in the making of any of the payments due under the terms of this agreement, or should he fail to keep or perform any agreement on his part herein made to be kept or performed, then and in that event the Buyer shall lose his right to the possession of the property, and the Sellers shall be entitled to retake the property, as hereinafter provided, and in that event the Buyer agrees to remove from the premises quietly and peaceably and without process of law, and agrees to deliver to the Sellers, or their agent, the business and property in as good condition as the same now are, reasonable wear and tear of the property excepted.

Provided, however, that in the event the Buyer is unable to make any particular monthly payment as the same becomes due, he shall notify the Sellers in writing and the Sellers shall allow the Buyer thirty (30) days thereafter to make such payment.

Until the entire purchase price of the property above described, together with interest thereon, shall have been fully paid by the Buyer to the Sell-

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

ers, the Buyer expressly agrees that: (1) he will pay any and all taxes and assessments accruing after the date of this agreement; (2) he will not permit nor suffer any lien or liens or other encumbrances to be placed against the above described property, or any part thereof; (3) he will keep the property above described insured at all times during the life of this agreement against loss by fire to at least the amount of \$17,500.00 and payable in the event of loss by fire as the interests of the parties may appear; and (4) that he will not assign this contract, or any interest thereunder, without first receiving the written consent of the Sellers to such assignment.

It is agreed between the Sellers and the Buyer that in the event the Buyer shall at any time sell the above described property, that the Buyer shall immediately pay to the Sellers the balance due under this agreement.

Time and each of the terms, conditions and covenants hereof are hereby declared to be of the essence of this agreement, and acceptance by the Sellers of any payment provided herein after the same is due or past due shall not constitute a waiver by them of this or any provision of this contract as to any subsequent default or breach.

In the event that the Buyer shall make any default in any deferred payment as hereinabove provided, at the time that the same may become due, or at the termination of the grace period herein-

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

above provided, or upon any failure by the Buyer to perform any of the covenants and agreements on his part herein agreed to be performed, and including, but not limited, to the agreement to permit no liens or encumbrances, and to pay taxes, assessments and impositions, and to keep insurance, the Buyer shall forfeit any right he might otherwise have to the premises and shall lose any right to demand a bill of sale to the property from the Sellers, as hereinafter provided, and thereupon the Sellers, at their option, may declare this contract terminated and may retain any and all moneys theretofore paid by the Buyer to the Sellers as rent for the use of the premises by the Buyer and as liquidated damages due to the Sellers for the nonfulfillment of this agreement by the Buyer.

The Sellers agree to deposit a copy of this agreement with the Bank of Alaska, at Anchorage, Alaska, and to deliver therewithin in escrow to said Bank of Alaska a good and sufficient Bill of Sale conveying the property above described to the Buyer, and upon the Buyer making full payment of all sums due to the Sellers under the terms of the agreement herein contained, and including interest, the escrow holder is to deliver the said Bill of Sale to the Buyer, but should the Buyer make default in any payment due to the Sellers hereunder, or should the Buyer fail to keep any agreement herein made on his part to be performed, the Sellers may, at their option, terminate this agreement and

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)
may give notice of the default or breach to the escrow holder, and upon demand therefor by the Sellers, the said escrow holder shall return the said copy of this agreement and the said bill of sale to the Sellers.

It is mutually agreed that the provisions of this agreement shall apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto, except that the right of the Buyer to assign this contract is limited as hereinabove set forth.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year in this agreement first above written.

/s/ LAWRENCE A. WHITE,

/s/ ERMA R. WHITE,

Sellers.

/s/ HERBERT E. PICKERING,

Buyer.

Signed, sealed and delivered in the presence of:

/s/ CATHERINE BRUNDAGE,

/s/ RICHARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 2nd day of May, 1949, before me, the undersigned, a Notary Public

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

in and for the Territory of Alaska, duly commissioned and sworn as such, personally appeared Lawrence A. White and Erma R. White, known to me and to me known to be the individuals named in and who executed the foregoing instrument, and they acknowledged to me that they signed and sealed the same as their voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first above written.

/s/ CATHERINE BRUNDAGE,
Notary Public for Alaska.

My Commission expires 3/3/51.

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 2nd day of May, 1949, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn as such, personally appeared Herbert E. Pickering, known to me and to me known to be the individual named in and who executed the foregoing instrument, and he acknowledged to me that he signed and sealed the same as his voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)
hand and official seal the day and year first above
written.

/s/ CATHERINE BRUNDAGE,
Notary Public for Alaska.

My Commission expires: 3/3/51.

[Endorsed]: Filed June 29, 1950. U.S.C.A.

Mr. Renfrew: I would be willing to waive the
reading of that if you wish to read it in argument or
at [72] another time.

Mr. Kay: That is fine. I will waive.

The Court: Do you have any cross-examination?

Mr. Renfrew: No, Your Honor.

(Witness excused.)

Mr. Kay: Call Mr. Easley.

OLIVER J. EASLEY

being called as a witness on behalf of the plaintiff,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your name please, Mr.
Easley?

A. Oliver J. Easley, E-a-s-l-e-y.

Q. Where do you live, sir?

A. 115 East Eleventh, Anchorage.

(Testimony of Oliver J. Easley.)

Q. How long have you been a resident of Anchorage, Mr. Easley?

A. Been a resident about two years and was on the base about two and one-half.

Q. May I ask what your occupation is?

A. Toolroom supervisor, Alaskan General Depot.

Q. Are you acquainted with Mr. Lawrence White, the defendant, sitting over at the table?

A. I have a speaking acquaintance with him.

Q. And you are acquainted with Mr. Carl Rentschler [73] sitting here at the plaintiff's table?

A. Yes, I am.

Q. Did you know Mr. White in the month of April, 1949? A. Yes, I did.

Q. Did you have occasion to have any conversation with Mr. White during that month?

A. Yes.

Q. Could you fix the time and the place and so far as possible give us the persons present at the time of this conversation?

A. Well, the time was in the last week in April and it was in the Alaska Railroad freight depot in the office.

Q. Any one else present besides yourself and Mr. White?

A. There are a lot of people there, clerks, but I don't believe there were any witnesses to our conversation.

Q. Would you tell the jury, please, just what

(Testimony of Oliver J. Easley.)

this conversation consisted of—what Mr. White said to you, what you said to him and so on and so forth?

A. We were waiting to pick up some freight, myself for the concern for which I work and it took quite a bit of time and we got in conversation with each other and I knew that he had been——

Mr. Renfrew: Now, I object, Your Honor. Maybe I can't object that it is not responsive to the question but [74] I can certainly object that it is irrelevant and immaterial.

The Court: Yes, you can object on other grounds.

Mr. Renfrew: Well, I do so object.

The Court: You mean what he was about to say?

Mr. Renfrew: He is giving his impressions, his opinions which are not proper.

The Court: Just relate the conversation without your opinions and try to refrain from stating what your impression was or about anything leading up to it.

The Witness: I see. I asked Mr. White if he were selling the L. & W. Candy Shop and he stated that he told me the man's name which I don't recall. I don't recall the man's name. I asked him if that was the man I had seen working in the L. & W. the past week or so and he said, "Yes, that was the man."

He said he was just down there picking up some machinery; I believe it was an ice cream machine or something and helping out the new owner temporarily until he got acquainted with the business.

(Testimony of Oliver J. Easley.)

That was just about the extent of our conversation.

Q. And about when did that conversation take place?

A. Well, it was some time in the last week in April.

Mr. Kay: That is all. [75]

Cross-Examination

By Mr. Renfrew:

Q. Mr. Easley, how long had you known Mr. White, did you say?

A. Well, I had been a customer in the L. & W. for a period of two or three years, in and out, and I knew who he was and I had talked to him at different times.

Q. A customer? You mean you went in there and bought a cup of coffee or a milk shake or something of that nature? A. That is correct.

Q. Over a period of time you have done that, you say? A. Yes.

Q. Have you ever visited in his home?

A. No, sir.

Q. Are you a married man? A. I am.

Q. Were you at that time? A. I was.

Q. Were you acquainted with Mrs. White?

A. No, I don't know her.

Q. Did Mr. White know Mrs. Easley?

A. No.

Q. Do you belong to any organizations where you attended together or anything like that?

(Testimony of Oliver J. Easley.)

A. Not that I know of. [76]

Q. Did you ever see him outside of the place of business?

A. From time to time, yes.

Q. Just on the street?

A. Yes.

Q. Just to speak to?

A. That is right.

Q. Your acquaintance, then, consisted of your knowledge that he was the owner or operator of the L. & W. Chocolate Shop and you were a customer?

A. That is correct.

Q. And that is the only relationship that you have ever had with him?

A. That is right.

Q. And other than seeing him on the street to speak to you never had any conversation with him other than what you have like in the barber shop or something like that?

A. That is correct.

Q. Now, on this conversation that you had in the Alaska Freight depot, did you say?

A. Yes.

Q. I believe you stated that the conversation went something like this: I asked White if he was selling the L. & W.?

A. That is right.

Q. You knew him well enough, did you, to inquire into [77] whether or not he was disposing of his place of business?

A. I had been around the L. & W. in the past week as a customer, used to go there all the time, heard a conversation—it appeared to be common knowledge. I was curious and asked him.

Q. In other words, you had heard someplace before that he was selling the L. & W.?

A. Yes, I had.

(Testimony of Oliver J. Easley.)

Q. And in the past week you had heard that?

A. That is correct.

Q. And so you are curious, your curiosity was aroused, and you waited until you saw him in the freight sheds and then you asked him down there and he said, "Yes, I have sold the place."

A. I didn't wait to ask him. I was merely passing the time of day.

Q. When you had seen him in the L. & W. you didn't ask him there?

A. I didn't hear it there.

Q. I misunderstood you. I thought you said you had been there and it was common knowledge down there.

A. It was in that block among the business men.

Q. You had heard it someplace else?

A. Yes, I had, yes.

Q. Where had you heard it? [78]

A. I worked for Leonard Hopkins at the time. I heard it there.

Q. You heard it over at Leonard Hopkins?

A. That is right.

Q. What had you heard, that he had sold it or he was selling it or White was selling out or what?

A. I just heard that he was selling it.

Q. That he was selling it? A. Yes.

Q. You say you are acquainted with Mr. Rent-schler? A. I am.

Q. How long have you known him?

A. About four years.

(Testimony of Oliver J. Easley.)

Q. And have you discussed this matter with him, have you?

A. Mentioned and discussed it a little bit some-time ago, not recently.

Q. Were you and he buddies in the army or something?

A. We were assigned to the same unit.

Q. How did you happen to talk with him about it that first time?

A. It was the same night that I had had the same conversation during the day with Mr. White and I knew that Mr. Rentschler had the listing for the L. & W.

Q. You knew about Mr. Rentschler's business, too, then? [79]

A. I knew that he had the listing for the L. & W., yes.

Q. Have you been in the courtroom today?

A. No, sir.

Q. You haven't been in here today?

A. Well, just when I came in just before recess.

Q. You didn't hear Mr. Rentschler's testimony?

A. No, sir.

Q. Did he tell you that he had the listing on that?

A. At the time he had the listing, yes.

Q. When was that?

A. I should imagine it was somewhere in the early part of April.

Q. Did he tell you that it was a confidential listing and that he was having difficulty disposing

(Testimony of Oliver J. Easley.)

of it because he wasn't supposed to tell anybody about it excepting the purchasers?

A. We didn't discuss it that much.

Q. He just told you. How friendly were you with Mr. Rentschler up to that time?

A. We have been good friends.

Q. Have you visited in his home? A. Yes.

Q. And he visited in yours? A. Yes.

Q. And you talk over your business probably together, [80] do you? A. Sometimes.

Q. And in this case he told you about his having the listing on the L. & W. Chocolate Shop?

A. He did.

Q. Did he tell you anything to the effect that White was trying to beat him out of his commission?

A. No, he did not.

Q. No mention made of anything like that?

A. (No response.)

Q. How did you happen to tell him about it that night that you heard the L. & W. had been sold?

A. Because from the thing that he had told me how long his listing was—in fact, he mentioned that he had a client who was going to buy it and I assumed that when Mr. White told me that he had sold the place that Carl Rentschler had made the sale for it.

Q. You didn't ask Mr. White if that was so?

A. I didn't know anything about it.

Q. Oh, you talked with Mr. White earlier in the day before you talked to Mr. Rentschler. That is why you told Rentschler about it that night?

(Testimony of Oliver J. Easley.)

A. That is correct. I didn't tell him about it. I congratulated him on making the sale.

Q. I see. You didn't ask Mr. White if Mr. Rentschler [81] had sold the property?

A. No.

Q. Now you say that Rentschler had already told you that he had a prospect for it and he figured he was going to be able to sell it? A. Yes.

Q. Did he tell you who the prospect was?

A. No.

Q. Didn't tell you his name? A. No.

Q. Do you remember when you had that conversation with him?

A. I couldn't recall exactly, no. Probably a week before the time before I talked to Mr. White.

Q. Mr. Easley, you of course know that I am going to ask you how you place this on the last week in April, but I would like to have you give me a good answer to that.

I know you have had plenty of time to think about it.

Mr. Kay: I will ask that that remark be stricken.

Mr. Renfrew: I will withdraw it and apologize.

The Court: The jury is instructed to disregard it.

Q. (By Mr. Renfrew): Why do you place it the last week in April?

A. I place it due to the fact that I knew that the [82] listing ran out right near the last of April, and I believe on the last day as I recall and I remarked to myself at the time that Carl must have

(Testimony of Oliver J. Easley.)

sold the property due to the fact that the listing was still good.

Q. How did you know the listing ran out on the last day of April?

A. Because Mr. Rentschler told me so.

Q. Mr. Rentschler told you sometime in the forepart of April that he had a chance to sell the L. & W. Chocolate Shop but that the listing ran out the last day of April, is that correct?

A. That is correct.

Q. Did he tell you that he also had a chance to sell something else over here and when the listing ran out?

A. No.

Q. The only discussion was about the L. & W. Chocolate Shop?

A. That is right.

Q. And that is the only thing that he told you he had any listing on?

A. That is right.

Q. And the only one he told you when the listing ran out?

A. That is right.

Q. And how long had he been in the real estate business [83] here?

A. Well, since he returned to the States after being separated from the Air Force. I think it was probably about a year or so.

Q. And you had been here during that period of time?

A. Yes.

Q. And visited with your friend?

A. I did.

Q. And yet the only listing he ever told you about is this one?

(Testimony of Oliver J. Easley.)

A. Not the only one he ever told me about. It was the only one I knew about at the time.

Q. And immediately after you had the conversation with Mr. White you thought, "Oh, oh, Rentschler has made himself some money."?

A. That is what I thought, yes.

Q. Because he told you that his listing ran out on the 30th?

A. That is correct. I assumed his listing was still good and that he had made some money on it.

Q. That impressed you to that extent? How much time did he have after that conversation that you had with Mr. White? What day was it? Was it the 29th?

A. I can't place the exact date. I know it was in the last week in April and as I recall I believe it was [84] on a Thursday.

Q. The last week in April. Why do you fix it at Thursday?

A. Because I had to work that night late. That was my regular night to have to work late in the store.

Q. This impressed you now to the extent that you can recall that you had to work that night late?

A. That is right.

Q. When did you see Rentschler?

A. After I got off work that night and went home.

Q. Did you go to his house?

A. We live next door to each other.

Q. Still, did you go to his house?

(Testimony of Oliver J. Easley.)

A. I don't recall whether I was over to his house or whether he was over to mine.

Q. What time did you get off work late that night? A. Nine o'clock.

Q. Either you went to visit him or he came to visit you? A. That is right.

Q. Do you frequently visit next door?

A. Possibly a couple of times a week.

Q. Yet you can positively remember that this was the last week in April? A. I do. [85]

Q. And you feel certain that it was on Thursday because Thursday was the night that you had to work late? A. That is right.

Q. You worked every Thursday night late, did you? A. I did, yes.

Q. Have you had occasion to look up the date of Thursday the last week in April? A. No, sir.

Q. You haven't checked that? A. No.

Mr. Renfrew: I think that is all, Mr. Easley.

Mr. Kay: That is all, Mr. Easley.

Mr. Kay: I will call Mrs. Eagleson.

CLARA M. EAGLESON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your name, please, Mrs. Eagleson? A. Clara M. Eagleson.

(Testimony of Clara M. Eagleson.)

Q. And what is your occupation, Mrs. Eagleson?

A. Real estate broker.

Q. Are you duly licensed as a real estate broker in the Territory of Alaska? A. I am. [86]

Q. And how long have you been such, Mrs. Eagleson, if you know?

A. I have been licensed since 1947.

Q. Do you recall, Mrs. Eagleson, a listing in your office of the L. and W. Chocolate Shop?

A. Yes, Carl Rentschler, who became associated with me in June of 1948, took the listing but Mr. White had prior talked to me about it before I moved down to my present location.

Q. Where was your office at that time, Mrs. Eagleson?

A. In the Anchor Book Shop on "H" Street, which is in the Harbor Building.

Q. Did you say that you had a conversation with Mr. White at about that time?

A. Yes, he had discussed with me placing his—selling his place. Just business conversations. I went in for lunch every day and several times we engaged in conversation.

Mr. Renfrew: I object to any further testifying on the ground that it is incompetent, irrelevant and immaterial. The contract has been introduced.

Q. (By Mr. Kay): Did your conversations result in the contract which has been introduced in evidence?

A. I wouldn't say that my conversations resulted

(Testimony of Clara M. Eagleson.)

in the contract being signed. He contacted Mr. Rentschler. [87]

Mr. Renfrew: I object to any of this now as hearsay.

The Court: The last part of her answer was not hearsay.

Mr. Renfrew: I beg your pardon.

The Court: There is no part of the answer that is hearsay.

Mr. Renfrew: Did she know that he contacted so and so and did such and such? Was she there?

The Court: When she says that he did the presumption is that she knows of her own knowledge.

Mr. Renfrew: I object to it on the grounds that she didn't state that she knew it of her own knowledge.

The Court: A witness can't do that with each and every question. Objection is overruled. You have adequate protection by cross examination.

Mr. Renfrew: All right.

Q. (By Mr. Kay): As a result of all this whatever-it-was, did you obtain a listing of the L. W. Chocolate Shop? A. Yes, sir.

Q. And is that in accordance with the contract previously introduced in evidence by Mr. Rentschler? A. Yes, sir.

Q. What, if anything, Mrs. Eagleson, did you do about selling the L. W. Chocolate Shop? [88]

A. Well, it is customary when——

Mr. Renfrew: I object to what is customary as an opinion and a conclusion of this witness.

(Testimony of Clara M. Eagleson.)

Mr. Kay: Well, he doesn't know but what she is going to say that it is customary to do exactly what I did.

Why don't you wait until she answers?

The Court: I think the objection will have to be overruled on other grounds and that is that she may testify to a custom of the business if it is so well known that the defendant himself would be presumed to know it.

Mr. Renfrew: What was that theory, your Honor; I didn't follow it.

The Court: It is not a theory; it is a law. There is a custom in the real estate business of such a kind that the defendant would be presumed to know about it and was ignorant of the contract.

I don't know whether she was going to testify to anything like that.

Mr. Renfrew: Would the Court want me to wait until after she has answered the question and then strike it?

The Court: You might wait until after the answer has been completed.

The Witness: It is customary when property is listed in our office that we proceed immediately with advertising. Mr. White requested at the time of listing, [89] when he signed with Mr. Rentschler, our representative, that he did not want it advertised in a manner that it could be identified as the L. & W. Coffee Shop. That is what we did.

We also agreed that there would be outside advertising and we advertised in the Seattle P.I., the

(Testimony of Clara M. Eagleson.)

Seattle Post Intelligencer is the proper name. Mr. Eagleson, my husband, was outside at the time and took the calls and interviews of the answers that were made through the Seattle Post-Intelligencer through the Hotel Fry in Seattle.

Mr. Renfrew: Now if *the* please the Court, I wish to interpose an objection on a reply made by the witness that the answer obviously is based on hearsay. She stated that her husband was outside and did certain things which I assume that she couldn't have been there to have heard.

The Court: Well, even if she had been there, it just seems to me that it is perhaps immaterial. The only point here as I see it is whether the plaintiff procured a purchaser and it seems to me these details are immaterial, unless you claim some relevance for them that isn't apparent.

Mr. Kay: I claim it is relevant, your Honor, to show what was done, under this listing. This contract does not require her to procure a purchaser.

The Court: But you are not suing for services you are suing for the commission. [90]

Mr. Kay: But in order to establish the validity of that contract it is proper to show the consideration which was exchanged for it and the consideration was the amount of things that she did to sell the place and the things that the agent did.

Mr. Renfrew: Is the validity of the contract in question here? We admitted it.

The Court: When a purchaser has been procured

(Testimony of Clara M. Eagleson.)

as you allege then the services, the intermediate services are not material here. In other words, you don't have to show consideration if there has been a procurement of a purchaser.

I don't want to unduly hamper you on any theory that you have. I am just suggesting that as a means of shortening the case. Unless you anticipate that they are vital to your case.

Mr. Kay: I don't believe it is vital but I think it would be helpful if she was merely allowed to state—which would take about one minute, the amount of money that she paid in advertising the L. & W. Coffee Shop both in Seattle P.I. and the Los Angeles papers and radio.

The Court: She may state in a general way, then.

Q. (By Mr. Kay): Mrs. Eagleson, in accordance with this listing——

Mr. Renfrew: What happened to my objection about the [91] hearsay? Are we going to strike that now?

Mr. Kay: I have withdrawn the question.

Mr. Renfrew: It has already been stated and answered and now he wants to withdraw it.

The Court: As I stated the answer was not hearsay on its face. It might be open to that interpretation but we can't make an independent exploration of each question or lay a foundation for each question first because it is presumed that it is not going to be hearsay. Of course, as I said before, you have adequate protection by cross examination. Go ahead.

(Testimony of Clara M. Eagleson.)

Q. (By Mr. Kay): Mrs. Eagleson, will you state approximately the amount of money which you and your agent expended in advertising the L. W. Chocolate Shop, both in Seattle and in Anchorage?

Mr. Renfrew: One moment. I wish to interpose an objection for the purpose of the record, that the answer to that question is irrelevant and immaterial and that is our theory of the case, your Honor.

The Court: Well, having already ruled on it—I said she may show that in a general way and not go into detail.

The Witness: The amount was between \$600 and \$700.

Q. (By Mr. Kay): You heard Mr. Rentschler's testimony concerning the prospects which he took down to the place? [92]

A. Yes, sir.

Q. Did you take any other prospects, or was he the only one who took prospects?

A. No, I don't. That was Mr. Rentschler's part of the work. I interviewed them in the office and try to process them and see if they are capable of buying if properly interested.

Q. Now, in the month of April, 1949, Mrs. Eagleson, did you have any conversations with Mr. White concerning the transaction?

A. Yes, I did.

Q. Could you state the approximate time and

(Testimony of Clara M. Eagleson.)

place of your first conversation with Mr. White during that month?

A. It was, I am quite sure, the 23rd of April.

Q. And where did the conversation take place, Mrs. Eagleson?

A. In my office. I asked him to come down by phone request.

Q. And was anyone else present in the office during the conversation?

A. No, I asked Mr. White to come down to my private office and we then engaged in conversation there.

Q. What did Mr. White say to you and what did you say to Mr. White during that conversation?

A. I told him that I had heard that he had sold and he [93] denied it and I told him then that I was positive that he had sold.

Q. Did you tell him how you were positive? What did you say to him? A. Pardon?

Q. Would you say if you told him how you knew?

A. I overheard him tell someone that he had sold and also Mr. Fred Neider.

Q. Did you tell him that?

A. Yes, and he said it was peculiar that people know more about my business than I do, so we went on and I told him that he was liable for the commission and he wanted to know the reason—I fixed this quite firmly as the reason—he thought he gave Carl a twenty-day extension which would bring it up to the 28th. The 23rd was five days

(Testimony of Clara M. Eagleson.)

prior to what he thought his final listing date was. It was up to and including the 30th day of April.

He told me that he had such a low bid from Mr. Pickering that he just couldn't pay a commission and accept the offer of \$30,000 and he went into his private affairs, into how tragic it was that he had to sell, that it was causing trouble; that his wife was going to leave him; that they were getting in each other's hair.

I said let me talk to Mr. Pickering and let me see if we can include him to commit himself to a price that will [94] allow for the commission which I agreed to take to help the deal out and Mr. White replied, "No, no, no, Pickering won't have anything to do with an agent. He is allergic to them."

So, I told him, "Well, if you will get him up to the price you want I agree to take \$2,000." He was very happy about it and he said he would pay it.

The deal went through and Mr. White did not come to see me and Mr. Rentschler went and told him that I would like to see him and he sent word back to me if I wanted anything out of him——

Mr. Renfrew: Your Honor——

Mr. Kay: You can't testify to what Mr. White said. Just say if some conversation was had and what happened as a result of that conversation.

The Witness: Mr. White said, "My information was that if I——

Mr. Renfrew: Just a minute.

Mr. Kay: Not "your information"——

(Testimony of Clara M. Eagleson.)

Mr. Renfrew: Can I make an objection or do I have any standing here at all? I can appreciate counsel's——

Mr. Kay: I am just trying to do exactly what you want done.

The Court: I don't see—There isn't anything before the Court now. He hasn't asked any question objectionable [95] in form that I know of. Now if you wish to make an objection at this time to something you will have to specify because I don't know what it is you are objecting——

Mr. Renfrew: I tried three times, your Honor, to make an objection and I have been interrupted by counsel.

The Court: But counsel stopped her himself from beginning hearsay.

Mr. Kay: If Mr. Renfrew would stop harrassing me in the examination of my witness and do his job when he gets to it maybe we will get along a little better here.

Mr. Renfrew: If those are your sentiments I will.

Mr. Kay: Those are my sentiments.

Q. (By Mr. Kay): As a result of something happening did you contact Mr. White again?

A. Mr. White replied if I wanted anything out of him that I would have to get it before the next morning.

Mr. Renfrew: We object to that answer.

Mr. Kay: Well——

Mr. Renfrew: That is what I have reference

(Testimony of Clara M. Eagleson.)

to, your Honor. I start to make an objection and then counsel interrupts.

The Court: But the Court always permits you to make the objection. Go ahead.

Mr. Renfrew: Thank you, your Honor. I object to [96] the reply that was made by the witness and ask that it be stricken. The preceding question shows that someone told her. I objected to that. Now counsel states you can't tell——

The Court: The presumption is, then that she is testifying from personal knowledge. That doesn't sound like it is within her knowledge.

Mr. Kay: I will just ask the question and bring it out.

Q. (By Mr. Kay): Did you see Mr. White again after this?

A. No, Mr. Rentschler was the representative.

Q. You didn't see Mr. White again?

A. No.

Mr. Renfrew: That doesn't bring out anything.

Mr. Kay: It brings out——

The Court: Well, he stopped from asking for hearsay; now you can't very well complain——

Mr. Renfrew: Do I understand, your Honor, that the jury knows now that they should not consider that testimony which she just made because it is hearsay? Do I understand that the jury knows that?

The Court: I don't know whether they will know it or not, but your objection just a minute ago now was to his question and not to her answer,

(Testimony of Clara M. Eagleson.)

and I have stated [97] that you have to be specific with your objections or the Court will not understand.

Now, if you object to her answer, that it is hearsay, I assume that from what counsel himself says that he concedes that it is hearsay.

Mr. Kay: I will concede that it may be stricken.

Mr. Renfrew: Your Honor, my objection was that it was hearsay and I ask that it be stricken.

Mr. Kay: And I will stipulate that it may be.

Mr. Renfrew: Thank you. Now we are down to where we got the ruling that I think I was entitled to, where he admits that it is hearsay if it——

The Court: You understand my ruling is this: When the question does not count for hearsay and when the answer is in such form that it doesn't appear to be hearsay, then it is not open to any objection that it is hearsay even though it might be hearsay.

It may develop on cross examination that it is hearsay but at this stage of the case I can't have it stricken out or strike it out as hearsay because it would be assuming that it is hearsay unless somebody concedes it is and that is the situation here in connection with his last question and answer.

Now we have to understand each other that if the question is not in such form that it calls for hearsay and if [98] the answer is not in such form that it shows it is hearsay, it is not open to objection.

(Testimony of Clara M. Eagleson.)

Mr. Renfrew: I concede that to be the rule, your Honor, and I apologize if the Court thought I was doing anything to the contrary but I think that both your Honor and Mr. Kay will concede that the preceding questions and answers that that answer had to be hearsay because she said that she was told that and not by Mr. White.

Now certainly I don't have to wait until cross examination to ask her again whether Mr. White told her that. The two preceding questions clearly show that it was hearsay so I ask that it be——

The Court: The ruling of the Court is that unless the form of the question that it calls for hearsay or unless the answer is such that it appears to be hearsay that you have to wait until cross examination.

Mr. Renfrew: Even though the preceding questions show that it is clearly a hearsay question?

The Court: I am not stating that it was the situation here. Go ahead.

Q. (By Mr. Kay): Now, then, Mrs. Eagleson, the conversation that you have testified to is the only conversation which you had with Mr. White during the month of April, to the best of your recollection? [99]

A. Yes, in which he agreed to pay a certain commission.

Mr. Kay: I think that is all.

(Testimony of Clara M. Eagleson.)

Cross Examination

By Mr. Renfrew:

Q. You stated, Mrs. Eagleson, on the direct examination that you had spent between \$600 and \$700 in the advertising the property concerned?

A. Uh huh.

Q. Did you spend that money on the original contract that you took in July of 1948 for 60 days; is that when you spent that money?

A. Mr. Renfrew——

Q. Can you answer the question yes or no, Mrs. Eagleson?

Mr. Kay: She doesn't have to answer a question yes or no. She can explain it, can't she?

The Court: If he asks her if she spent it during a certain period there is no reason why she can't answer it.

The Witness: No, not within the first 60 days.

Q. (By Mr. Renfrew): How much of the \$600 or \$700 did you spend when you had the original listing in the first 60 days?

A. I can't say right to the penny how much it was but it was in the vicinity of \$400.

Q. In the vicinity of \$400?

A. Uh huh. [100]

Q. Then you received no prospects on the original listing, did you? That is, you did not make any offer of sale to Mr. White on the original listing?

A. We had no one wanting to put up money.

Q. All right.

(Testimony of Clara M. Eagleson.)

A. Many prospects but no one wanting to put up money at that time.

Q. So you had no opportunity to sell it?

A. No, I would say not.

Q. I will ask you, in the usual course of real estate business where you take an exclusive listing, as you say you had on this, is that your general way of doing business where you advertise the property, when you sell it you get back your money and the commission, and if you don't sell it it is the cost of doing business? A. Uh huh.

Q. If you spent up to \$400 on the original listing, when did you spend the difference between that and \$700 or \$600 which would either be two or three hundred, when was that spent?

A. After our listing had expired. Mr. White—we had conversations off and on. They were more like friendly conversations, in which he said that he still wanted to sell and he said, “Keep plugging” and we did. I was——

Q. Mrs. Eagleson, I am constrained to stop you. I [101] don't want to clutter up this business. I asked you when you had spent the other two hundred or three hundred dollars?

A. Sometime between the expiration of the listing and the expiration of the extension.

Q. Well, how much would you say that you spent from the time that you received the extension which I believe was on the 8th of April, until the end of April—the 30th of April?

A. Approximately one hundred dollars, which

(Testimony of Clara M. Eagleson.)

was mostly done by—I think the biggest part of the expense was radio.

Q. And may I ask where that radio advertising took place?

A. I could be mistaken on that without reviewing my records, Mr. Renfrew, but if it was over the radio it was KFQD.

Q. And your radio programs were not limited to one piece of property?

A. We didn't have very much time to talk. You couldn't put very many of them on.

Q. The question I asked you was whether or not your radio program in the morning when you advertise over the radio, was that limited to one piece of property?

A. On a large listing it had to be. Time didn't permit anything else. [102]

Q. Is it your testimony, then, that you spent one hundred dollars in the month of April attempting to sell the Lounsbury and White Candy Shop? I ask the question, Mrs. Eagleson. Did you do that—spend one hundred dollars in the month of April by radio advertising for the sale of this property—only this property?

A. I won't say it was all radio. I think the biggest part of it was radio. There was some paper advertising. We couldn't identify it. Mr. White didn't want us to identify it as the L. & W. Shop.

Q. In general what you did was advertise for buyers of businesses and so forth, isn't that true?

A. No, the place was described and the approx-

(Testimony of Clara M. Eagleson.)

imate return on your investment was gone into so as to interest people with that kind of money. You don't have very many of them, you know.

Q. You have talked this matter over with Mr. Rentschler when he went to get the extension?

A. Mr. Rentschler never did anything without discussing it with me first.

Q. Did you talk this matter over with Mr. Rentschler?

A. Certainly. Every dealer in my office talks with me first.

Q. All right. Thank you. Now, in this deal, did you understand that Mr. Rentschler had the number of prospects [103] that he had been working on and that is why he went to get the extension?

A. Yes, I knew every one of them.

Q. If he had all those prospects was it after they had petered out so to speak, that you continued to spend more money on advertising?

A. No, right up to the last day we still had people interested but they could not put down any more money than Mr. Pickering.

Q. Did you have an offer from anyone to buy these premises at any price?

A. We had an offer. He had \$4000 with him. He would have put up more but he couldn't get to first base for less than \$40,000.

Q. Did you have any offer or convey any offer that you had for the sale of these premises to Mr. White or Mrs. White?

A. I never talked with Mrs. White in my life.

(Testimony of Clara M. Eagleson.)

Q. Did you ever talk to Mr. White about any offer that you had?

A. Uh huh. I told him that we had this off offer. He said, "I can't take it. I need more money."

Q. When was that and who did you have the offer from?

A. A man by the name of Uran, I think his name is [104] pronounced.

Q. Uran? A. Uh huh.

Q. U-r-a-n?

A. I think that is the way you spell it.

Q. And he offered you \$40,000?

A. No, he did not. He said he wouldn't pay \$40,000 and that is the best we could get out of White.

Q. What offer did he make?

A. By the time he got around figuring it over to make another offer, Mr. White had sold to Mr. Pickering.

Q. Did you ever tell Mr. White that Mr. Uran had made an offer for his premises?

A. Yes, I did. Let me answer. I told him that we had this offer of \$4000 but he didn't think it was worth \$40,000.

Q. In other words, it is my understanding now that you told Mr. White, "We have a buyer for \$4,000."

A. He had 4000 down and he said he could get more in a limited time but that was all he had with him at that time and Mr. White said, "No, I can't

(Testimony of Clara M. Eagleson.)

take it" and then Mr. Uran wouldn't go \$40,000 and Mr. White didn't want to come down under \$40,000, otherwise he would sell to Pickering.

Q. Did you ever discuss with Mr. White what Mr. Uran [105] was willing to pay along on a monthly-payment plan?

A. Mr. White never committed himself further.

Q. Mrs. Eagleson, may I caution you, if you will please answer the questions that I ask you without going into so much detail. I think then we can talk more slowly and perhaps unencumber the record.

A. All right.

Q. My question is a very simple one. Did you ever at any time advise either Mr. White or Mrs. White that you had a buyer for their premises who was willing to pay a specific amount of money?

A. Yes. When Mr. White was in my office on the 23rd——

Q. All right. On that date what did you advise Mr. White?

A. I didn't advise him anything. I just told him what I had and he told me, "I can't take it. I have to have more money."

Q. Evidently you misunderstood, Mrs. Eagleson, I am trying to be so careful with you. What did you advise Mr. White as to the actual price that Mr. Uran would be willing to pay then for his business?

A. Mr. Uran would not state a final offer. He told me to ask Mr. White his best price but he said—Mr. Uran said—"I will not go \$40,000." I

(Testimony of Clara M. Eagleson.)

Q. Did you ever talk to Mr. White about any offer that you had?

A. Uh huh. I told him that we had this off offer. He said, "I can't take it. I need more money."

Q. When was that and who did you have the offer from?

A. A man by the name of Uran, I think his name is [104] pronounced.

Q. Uran? A. Uh huh.

Q. U-r-a-n?

A. I think that is the way you spell it.

Q. And he offered you \$40,000?

A. No, he did not. He said he wouldn't pay \$40,000 and that is the best we could get out of White.

Q. What offer did he make?

A. By the time he got around figuring it over to make another offer, Mr. White had sold to Mr. Pickering.

Q. Did you ever tell Mr. White that Mr. Uran had made an offer for his premises?

A. Yes, I did. Let me answer. I told him that we had this offer of \$4000 but he didn't think it was worth \$40,000.

Q. In other words, it is my understanding now that you told Mr. White, "We have a buyer for \$4,000."

A. He had 4000 down and he said he could get more in a limited time but that was all he had with him at that time and Mr. White said, "No, I can't

(Testimony of Clara M. Eagleson.)

take it'' and then Mr. Uran wouldn't go \$40,000 and Mr. White didn't want to come down under \$40,000, otherwise he would sell to Pickering.

Q. Did you ever discuss with Mr. White what Mr. Uran [105] was willing to pay along on a monthly-payment plan?

A. Mr. White never committed himself further.

Q. Mrs. Eagleson, may I caution you, if you will please answer the questions that I ask you without going into so much detail. I think then we can talk more slowly and perhaps unencumber the record.

A. All right.

Q. My question is a very simple one. Did you ever at any time advise either Mr. White or Mrs. White that you had a buyer for their premises who was willing to pay a specific amount of money?

A. Yes. When Mr. White was in my office on the 23rd——

Q. All right. On that date what did you advise Mr. White?

A. I didn't advise him anything. I just told him what I had and he told me, "I can't take it. I have to have more money."

Q. Evidently you misunderstood, Mrs. Eagleson, I am trying to be so careful with you. What did you advise Mr. White as to the actual price that Mr. Uran would be willing to pay then for his business?

A. Mr. Uran would not state a final offer. He told me to ask Mr. White his best price but he said—Mr. Uran said—"I will not go \$40,000." I

(Testimony of Clara M. Eagleson.)

asked Mr. White what his lowest price would be under the circumstances and he [106] said, "I cannot take it because I can not take that small down payment" and it stayed there.

Q. That was on the 23rd? A. 23rd, yes.

Q. That was the same date that you had the conversation which you have previously mentioned when you called Mr. White and had him come in as you had understood that the business had been sold? A. That is right.

Q. And did you not state on direct examination that you stated to him, "I understand you have sold your place"? A. Yes.

Q. And he at that time stated to you, "I have not sold my place," isn't that true?

A. No, he didn't say it that way. First he denied it and he said people knew more about his business than he did about it himself.

Q. Yes?

A. And I said I am very positive that you have sold your place to Mr. Pickering and then he told me that it wasn't paying enough money and he couldn't and I said you are liable for the commission——

Q. Mrs. Eagleson, let's try now to confine our answers if we can to just the questions which I ask you. My next question is as follows: Did Mr. Uran or any other prospect [107] whom either you or any of your agents were able to interest in the purchase of Mr. White's business, ever make any

(Testimony of Clara M. Eagleson.)

concrete offer to you as to what they would be willing to give for the business?

A. Mr. Uran was the only one who made an offer as near complete as I quoted in the last question.

Q. Did Mr. Uran ever make any concrete offer as to an amount of money that he would be willing to pay for the White Candy Shop?

A. No, he asked Mr. White to set the price.

Q. Now, just a moment. I am asking you just whether or not he ever made any concrete offer to you or in your presence to Mr. White of an amount of money that he would pay for the business?

A. No.

Q. Now, were you personally acquainted with Mr. Pickering? A. No.

Q. Did you only find out that Mr. Pickering was interested in the purchase of this business through either some third party or Mr. White himself? A. Mr. White.

Q. Mr. White himself? A. Yes.

Q. Did you know at that time that he was an employee of Mr. White's? [108]

A. No, I didn't know anything about it at all.

Q. You made no contact with Mr. Pickering?

A. I contacted Mr. White first and he told me not to.

Q. The question was, did you make any contact with Mr. Pickering? A. No.

Q. Now, on your direct examination you made some statement in substance that a new deal was

(Testimony of Clara M. Eagleson.)

made between yourself and Mr. White on the 23rd of April in which it was agreed that he would pay you a commission of \$2,000 if the sale went up. Now can you explain what you meant by that—slowly if you will, please, so that the court reporter will get your answer.

A. Well, I don't think you could call it a new deal, Mr. Renfrew. When Mr. White admitted that he was accepting and contemplating taking Mr. Pickering as a purchaser, he said, "I cannot afford to take the price that he is offering me of \$30,000 and pay a commission." And I said, "Let me get—Let's talk together and we surely—Mr. Pickering would be willing to pay \$35,000 and I agreed.

We had always been friendly with Mr. White and he told me of his troubles and——

Q. Just a moment, you are getting clear off the subject. You are not replying to the question.

A. All right. So, he said he would try to bring him [109] up above \$30,000 and the agreement was he was to pay me \$2,000 upon the reduced price of sale to Mr. Pickering over and above, if he could get him up over \$30,000——

Q. Was there anything said about when he would pay you \$2,000 if he was able to get the price above \$30,000?

A. No, the general assumption is those things are paid when they are——

Q. Was there anything said about when he would pay you the \$2,000? That was my question.

(Testimony of Clara M. Eagleson.)

A. Not to my knowledge, not an exact date mentioned.

Q. Did you take it from that conversation that even if he did not sell to Mr. Pickering until the Fourth of July that you would still be entitled to get a commission?

Mr. Kay: I object to that as irrelevant.

The Witness: I didn't state that.

Q. (By Mr. Renfrew): I asked you if that was your impression?

A. Depending on the contract. I expect the contract to be lived up to. I had lived up to it and I expected him to.

Q. Did you have any understanding as to when the sale would be made with Mr. Pickering? In other words, was that agreement between you and Mr. White good for after your extension which expired according to the evidence here on the 30th day of April? [110]

A. There was no date mentioned. He expected to close the deal, he said, on or before the first. He said that our extension expired on the 28th which it didn't; it went to the 21st of May and I wrote him out the listing and showed it to him.

Q. Then was it your understanding in that conversation that in the event he sold before the listing was up, to Mr. Pickering, that you were to receive a commission, but that if he sold after the listing you were not to receive a commission?

A. That never entered into the conversation. The only conversation on that score was that if Mr.

(Testimony of Clara M. Eagleson.)

Pickering paid more than \$30,000 that he was to pay a commission of \$2,000.

Q. Was that new agreement, that you have just related now, which you made with Mr. White, did that agreement extend your option of the exclusive sale of the property after the 30th day of April?

A. No, there was no further date made other than that he had sold the property. He told me so.

Q. Do I understand that he told you that he had the property sold? A. Yes.

Q. And that you suggested to him then, "Let me talk to Mr. Pickering and maybe even though you have already [111] sold it to him for \$30,000, I can make him pay \$32,000"?

A. No, it wasn't in that vein at all, Mr. Renfrew; he said he wanted us to get the price up if we could, which, of course, we hadn't been able to do so he said, "I will have to take the offer that he has given me because I have to go through with it." But he said, "I can't afford to pay a commission when I only sell for \$30,000" and I said, "In that event you will have to pay the commission you have contracted for" and he said—

Q. Do I understand your testimony, Mrs. Eagleson, to be that Mr. White told you "I have sold this property for \$30,000 but if I can by some strange way get the purchaser now after I have sold it to him for \$30,000, to make it \$32,000, I will give you \$2,000?"

A. No, that wasn't the wording. His offer from Mr. Pickering was \$30,000. The papers had not

(Testimony of Clara M. Eagleson.)

been signed. They were waiting for the listing to expire. They thought it was the 28th. Mr. White admitted all that and I brought out the listing and showed him that it wasn't, that it ran until the first.

Q. Then it was your understanding that the papers have not been signed as yet and that the deal had not been closed instead of the contrary, is that your——

A. I inferred that much because he said that he couldn't afford to pay on \$30,000 but if he could get him [112] up beyond \$30,000 he would be able to pay the commission.

Q. As a matter of fact, Mrs. Eagleson, he told you that the papers had not been signed?

A. No, he didn't say that exactly. He inferred as much.

Q. Didn't you just state that he said, "These papers have not been signed and we are waiting until the option expires?"

A. No, I said that the purpose was—that I thought the purpose was to wait until the option had expired.

Q. Did he state that the papers had been signed?

A. No.

Q. May I ask why you mentioned a moment ago that the papers had not been signed?

Q. I didn't say they hadn't been signed.

Q. Well, did he or did he not tell you that he had sold this place of business for \$30,000?

A. He told me that he had entertained the offer

(Testimony of Clara M. Eagleson.)

from Mr. Pickering of \$30,000 which he would be obligated to take if he didn't get a better offer.

Q. Then you did not infer from that that he had sold the property to Mr. Pickering?

A. Yes, I did.

Q. You mean even when he told you that he would have to take Mr. Pickering's offer if he didn't get a better one [113] was tantamount to telling you that he had sold it to Mr. Pickering?

A. I didn't take what Mr. White said as gospel truth about the transaction because the man was in possession of the place.

Q. What man, do you refer to?

A. Mr. Pickering.

Q. Wasn't it true that Mr. White was there also?

A. Yes, he was and he told me, too, "I am teaching him the business as I agreed to teach anyone who would purchase my place" which he did.

Q. Now, I will ask you, Mrs. Eagleson, whether during your option agreement as the exclusive agent of this property which, according to the record signed July 8th and the extension which you received on the contract which was up on the 30th of April, 1949, did you at any time ever state to Mr. White any concrete offer of any purchaser for the sale of the Lounsbury-White Candy Shop?

A. I answered that several times and the answer was "No."

(Testimony of Clara M. Eagleson.)

Q. I will ask you, your option, I believe called for the sale at \$45,000? A. Right.

Q. And you never at any time were able to secure a purchaser at that price?

A. That is right. [114]

Mr. Renfrew: May I have the original file for just one moment?

Q. Mrs. Eagleson, I hand you the complaint in this case and ask you if that is your signature?

A. Yes.

Q. And that is the complaint, is it not, that you swore to before Wendell P. Kay as a notary public?

A. Yes, but that wasn't to the effect that I had seen Mr. Pickering.

Q. I just asked you a question. Is that the complaint which you swore to before Mr. Kay?

A. Yes.

Q. Now, I want to ask you what you meant by this statement:

"That thereafter and during the month of March, 1949, the plaintiff was instrumental in obtaining one John Doe Pickering to purchase said property."

Now, what did you mean by that, Mrs. Eagleson?

Mr. Kay: Your Honor, if he is going to examine on that I would like to ask to examine—ask to amend the complaint to add "during the month of April, 1949," to conform with the proof. The proof is that her activities with Mr. Pickering was in April, 1949.

(Testimony of Clara M. Eagleson.)

The Court: If you want to amend I think you had better do it at the first opportunity, otherwise we might be confronted [115] with the situation that where counsel after a lengthy examination has discovered that the whole examination was futile.

Mr. Kay: I am sorry, I hadn't noticed that we said "March" I should have amended in that regard already.

The Court: Do you wish to make the amendment by interlineation now?

Mr. Kay: I would. I would like to take out the word "March" and substitute the word "April."

The Clerk: You want the "April" substituted for "March"?

Mr. Kay: That is true.

Q. (By Mr. Renfrew): May I proceed, your Honor? I will ask you the same question, Mrs. Eagleson, with the change in the month, what did you mean when you stated "That thereafter and during the month of April, 1949, the plaintiff was instrumental in obtaining one John Pickering to purchase said property"?

A. Well, by "instrumental" it was this, that Mr. White wanted us to bring about our former prospects or any new one and try to create such an interest in a possible sale to someone else that it would bring Mr. Pickering up to a better price.

Q. That is what you meant when you say you were instrumental in obtaining John Doe Pickering

(Testimony of Clara M. Eagleson.)

to purchase said property. A. Yes. [116]

Q. Now, I will ask you, did you bring around anyone else who made an offer of purchase of the property at any figure?

A. No, we brought several people but they did not make a positive offer.

Q. And you feel that the fact that you brought someone in to look at the place was instrumental in influencing Mr. Pickering to purchase it?

A. Well, the idea was to influence him to get up above \$30,000 and he did.

Q. Mrs. Eagleson, when did you first know what Mr. Pickering paid for those premises?

A. What his offer was first or what he paid?

Q. What he paid?

A. I think possibly that the first statement—first positive statement I heard was when Mr. White quoted the price that he sold from.

Q. When was that?

A. On the stand this morning.

Q. Now, in your complaint you alleged that upon information and belief the property was sold to John Doe Pickering for \$45,000?

A. I heard that; it was only hearsay. And I also heard the price of \$37,500 and that was hearsay. But the only positive price that I have heard and I can say that I know was positive coming from the first parties was this morning coming [117] from Mr. White, the amount of \$35,000.

Q. Now, then, when you instituted this lawsuit you didn't know whether Mr. White had sold that

(Testimony of Clara M. Eagleson.)

business for \$30,000 or less, did you, or more?

A. No, I didn't know positive. I hadn't seen it in figures.

Q. Had anyone told you that knew the facts or who purported to know the facts?

A. No, no, no one that I can say really knew.

Q. Were you basing your contention when you instituted this action on the fact that the new arrangements—you state that you made with Mr. White—if he could get Mr. Pickering above \$30,000 up to \$32,000 you were supposed to get that \$2,000?

A. No, that wasn't the arrangement. I told him that if he had to take such a whipping that I would cut my commission. You see, 10-percent on \$30,000 would be \$3,000 and I said "I will cut my commission to \$2,000 and that will help you along and take a licking along with him" and there was no special price mentioned, only if he got above \$30,000 that he was to pay the commission, which I had agreed to take at that time, of \$2,000.

Q. Now, was that arrangement conditioned upon the fact that if you were able to get a buyer who would make a concrete offer so that Mr. Pickering who could be faced with an offer [118] of "Here is Mr. Uran now who will give \$35,000 for this, what will you give, Mr. Pickering?" Wasn't that offer contingent upon such an arrangement as that?

A. No, it wasn't; it was more an idea of stimulation—a desire to purchase of Mr. Pickering—desire to purchase. There is no concrete dickering of where you must get me an offer.

(Testimony of Clara M. Eagleson.)

Q. In other words, when you had your conversation, which was on the 23rd of April——

A. Uh huh.

Q. ——Mr. Pickering had already offered \$30,000 according to what your recollection of what Mr. White had told?

A. Only what Mr. White told me; I had never met Mr. Pickering.

Q. But Mr. White told you that he had had a \$30,000 offer from Mr. Pickering? A. Yes.

Q. And you were never able to even get an offer of \$30,000, were you?

A. Well, Mr. Renfrew——

Q. Answer the question yes or no.

A. I don't say I wasn't able to.

Q. Did you ever procure an offer of even \$30,000 and advise Mr. White of it?

A. Not in round figures. I was asked for his lowest [119] cash figure and he wouldn't submit it to me.

Q. But your lowest cash figure according to your listing was a sale of the property at \$45,000, isn't that true?

A. No, that wasn't the lowest, that was tops and we were to submit if we got anything different and everything we did get we did submit to Mr. White but he would not cooperate by stating his lowest cash price, Mr. Renfrew.

Q. Am I in error or do I understand that you maintain according to your complaint that you had a listing on this property in which you had the

(Testimony of Clara M. Eagleson.)

exclusive right to sell it providing you sold it for \$45,000, now is that correct or is that false?

A. I don't quite understand your question. You had better say it again.

Mr. Kay: I object to it; the document speaks for itself.

Mr. Renfrew: It is a part of the complaint. She swore to it and attached it to the complaint.

Mr. Kay: And it speaks for itself.

The Court: The fact that it is attached to the complaint wouldn't take it out of the rule that it speaks for itself.

Mr. Renfrew: Since she has invoked, your Honor, this question of maybe another contract which was made at sometime in April of 1949, I think she states the 23rd——? [120]

The Court: If that is a fact you may examine her without limit.

Mr. Renfrew: May I now refer to the original contract with regard to this \$45,000?

The Court: You may ask the question and see what the form of it is.

Q. (By Mr. Renfrew): Did you not understand, Mrs. Eagleson, that the only price that you had that you could sell this property for was \$45,000?

Mr. Kay: I object to that; the contract speaks for itself, your Honor.

The Court: Well, but if she had any different understanding from it, I think she may answer it.

The Witness: Mr. Renfrew——

(Testimony of Clara M. Eagleson.)

Mr. Renfrew: Just answer that question yes or no.

The Witness: I can't answer it yes or no.

Mr. Kay: How can she do it?

The Witness: I——

Mr. Renfrew: I will make the question simpler.

Mr. Kay: Do that.

Q. (By Mr. Renfrew): Did you understand that you could sell that property without consulting Mr. White or Mrs. White for less than \$45,000?

A. No, sir.

Q. Did you understand that you could sell it bona fidely and that you had a right to if you secured \$45,000 for it? A. Yes.

Q. Did you at any time ever have any agreement with Mr. White or Mrs. White that you could sell that property for less than \$45,000?

A. No, not——

Q. "No" that is enough.

A. Am I not allowed to explain, your Honor?

The Court: If you want to explain your answer you may do so.

The Witness: Mr. White when he talked with me about listing his place he said "Submit me any reasonable offer."

Q. (By Mr. Renfrew): You have testified to that previously, but now I will ask you again: Did you ever at any time submit any offer to Mr. White for the sale of his property at any figure that you had an offer to buy this property at any figure?

(Testimony of Clara M. Eagleson.)

A. I am going to repeat the answer that I made to you about Mr. Uran, he had cash money to offer and he wanted to hear Mr. White's best offer. He would not pay \$40,000 and he wouldn't pay \$45,000 but he would entertain a lesser figure if Mr. White was interested in giving him one.

Q. And that is the only offer you ever tendered Mr. White [122] was "Here is a man who has \$4,000 to pay down but he won't pay \$45,000 and he won't pay \$40,000, will you take any less?"

A. That is right.

Q. And Mr. White said "I will not"?

A. No, he did not.

Q. What did he say?

A. He didn't answer at all; he never has answered.

Q. He never answered? A. No, sir.

Q. And that is the only offer you ever had for the property?

A. That I could possibly submit as an answer, yes, sir.

Mr. Renfrew: I think that is all, your Honor.

Mr. Kay: I have no further questions.

Perhaps in view of your Honor's admonition perhaps it would be wise at this time to ask to make one other amendment to conform with the proof. At the time of the drafting of the amount we did not know the correct amount, that amount appears to be, according to the exhibit, \$35,000. I would ask leave on the second page of the complaint to amend the "Forty-five" to insert the words

(Testimony of Clara M. Eagleson.)

“Thirty-five” and the same in the fifth line and in paragraph four to substitute \$3500 for \$4500 and wherever it appears in the fifth paragraph.

The Court: The amendment is allowed.

Mr. Kay: Plaintiff rests, your Honor. [123]

The Court: Are you ready to proceed with your case?

Mr. Renfrew: Just for the purpose of the record, I am wondering if I shouldn't make a motion, your Honor. Could I have just a moment to review this?

I wish to make a motion for judgment on the pleadings on behalf of the defendant. I don't care to argue it.

The Court: Very well, the motion is denied. You may proceed.

Mr. Renfrew: I wish to call Mr. Pickering, your Honor.

HERBERT E. PICKERING

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Mr. Pickering, will you please state your full name and spell your last name?

A. Herbert E. Pickering, P-i-c-k-e-r-i-n-g.

Q. And how long have you been in the Territory of Alaska, Mr. Pickering?

A. I first came to the Territory in 1946.

(Testimony of Herbert E. Pickering.)

Q. Have you been in business in Anchorage and other cities in the Territory?

A. I have been in business in Fairbanks from a period of from 1941 until coming to Anchorage, at which time I started [124] working with Mr. White.

Q. I will ask you what time it was that you came to Anchorage?

A. On the 25th of February, 1949.

Q. On the 25th of February, 1949?

A. That is right.

Q. And at that time did you seek employment at the Whites' place of business?

A. No, sir.

Q. Did you subsequently seek employment with Mr. White?

A. Not in the sense, Mr. Renfrew.

Q. Explain to us, were you employed by him?

A. No. Mr. White and I had made an arrangement whereby I would trade certain services for him in return for the learning of the candy business.

At the time that that verbal arrangement was made I had no idea of buying the L-W Chocolate Shop. My intention was to learn the candy business and perhaps go back to Fairbanks and start a candy business.

Q. Then, in the strict sense of employment you were never employed? A. That is true.

Q. But you did work in the White Candy Store in consideration of him teaching you to make candy.

(Testimony of Herbert E. Pickering.)

is that your statement? A. Yes, sir. [125]

Q. And how long were you so employed?

A. I think from approximately the 10th of March until the day that I purchased the L-W Chocolate Shop, which was May 1st.

Q. Now, to my right are sitting, I believe, Mr. Eagleson, are you acquainted with him?

A. No, sir.

Q. Did you ever meet him? A. No, sir.

Q. And the next gentleman is Mr. Rentschler, do you know Mr. Rentschler?

A. I have seen his face.

Q. Have you ever met him?

A. I have never been introduced to him.

Q. And the next lady is Mrs. Clara Eagleson.

A. I met Mrs. Eagleson on the 10th of this month when she came into the L-W and introduced herself as Mrs. Eagleson in behalf of the Chamber of Commerce, at which time she asked me to come——

Q. I don't care about that. That is the first time you met her, is that true? A. That is true.

Q. Now, I will ask you, during the time from about March 10th, 1949, until May 1st when you state you purchased the L & W Candy Shop, did you know during that interim that the place was for sale? A. Yes, sir. [126]

A. Yes, sir.

Q. And I will ask you whether or not during the time that you were there did you ever see any prospects being brought into the place by any of these people? A. I did.

(Testimony of Herbert E. Pickering.)

Q. And about how many times, if you can recall?

A. One time only.

Q. Were you there every day?

A. Yes, sir.

Q. And what hours did you work ordinarily?

A. My working hours with Mr. White was from 7 or 8 in the morning until 11:30 every night and sometimes until 1:30 or 2:00 the next morning.

Q. Do you recall an instance when someone came in with regard to the purchase of the place?

A. Yes, sir.

Q. And do you know who that was?

A. I am unable to tell you the man's name, I know that he was a very tall man. It is my understanding that he was from Portland. Mr. Rentschler brought him in.

Q. This gentlemen now sitting right here?

A. Yes, that is right,——

Q. Yes——

A. ——however, of the conversation or of what took place I don't know. I was busy in the back room making candy for [127] the Easter Day—for the Easter coming up.

Q. The previous Easter?

A. That is right.

Q. Could you state from the fact that you were making candy for Easter about the time that Mr. Rentschler and the gentleman came in?

A. No, I haven't given it any thought; I couldn't tell you. I presume it was in the month of April; I presume it must have been.

(Testimony of Herbert E. Pickering.)

Q. Is that the only time that you know of that you ever saw anyone in the company of Mr. Rentschler? A. He is the only one that I ever saw.

Q. That came in to look the place over?

A. That is right.

Q. Now, when did you first discuss the purchase of this business or the possible purchase of this business with either Mr. or Mrs. White?

A. I would say sometime after the first of April.

Q. Sometime after the first of April?

A. That is right.

Q. And was any concrete deal made for the purchase of this property by yourself during that month?

A. We discussed the price that Mr. White would sell the property to me contingent upon my being able to raise the money and above all not until after the first of May. [128]

Q. And I will ask you why you added that last statement "above all not until after the first of May"?

A. Because it was my understanding through Mr. White that it would be unnecessary to deal with any agency after the last day of April.

Q. Did you have any understanding at all with regard to whether or not the property could be sold prior to May first by the Eagleson agency?

A. I was told by Mr. White that the property could be sold to anyone else up to the time of the expiration, which I heard was the last day of April.

(Testimony of Herbert E. Pickering.)

Q. And is that the date you purchased this property? A. First of May.

Q. First of May? A. First of May, 1949.

Q. Did you ever have—I will ask you, was there any wrangling over price between you and Mr. White on the sale of this?

A. Absolutely none.

Q. When was the price agreed upon?

A. I would say within a period of two or three days from the time that he discussed the selling price, which was a price which I could handle; in other words, any price above the \$35,000 I wouldn't even consider, neither did I attempt to buy it for less. [129]

Q. The only figure you ever discussed was \$35,000? A. That is right.

Q. And you were cognizant of the fact that the property could be sold by Eagleson's to any purchaser up to the first of May?

A. That is true.

Q. And did you know what price it was listed for?

A. I didn't know specifically what price that he had it listed with this particular agency; I was aware that he had had it listed at various prices upward from \$35,000.

Mr. Renfrew: I think that is all, your Honor. Just one further question.

Q. Did you ever have any discussion with Mr. White about the fact that this property was listed

(Testimony of Herbert E. Pickering.)

with the agency and that you could make a deal with them if you wanted to, anything of that nature?

A. Will you clarify that a little bit?

Q. Well, the question is objectionable if counsel wishes to object to it,——

Mr. Kay: Oh, go ahead.

Mr. Renfrew: ——so I guess I had better let him

The Witness: I really didn't hear you, Mr. Renfrew.

Mr. Renfrew: That is all right, I will withdraw the question and let Mr. Kay ask it. [130]

Cross-Examination

By Mr. Kay:

Q. I believe you said, did you not, Mr. Pickering, that you agreed on the price with Mr. White within a few days after you first discussed it with him?

A. That is true.

Q. And your first discussion with him was sometime shortly after the first of April, is that correct?

A. That is true.

Q. So you had definitely agreed on the sale price of \$35,000 with Mr. White early in the month of April, 1949?

A. May I add: Yes, only contingent upon my being able to liquidate certain assets in Fairbanks.

Q. Now, had you also agreed with Mr. White on the terms of payment, Mr. Pickering?

A. Yes.

Q. You had agreed that you were to pay whatever the contract—\$9,000 down, is that correct?

(Testimony of Herbert E. Pickering.)

A. No.

Q. I am sorry, \$6,000 down?

A. That is right.

Q. And \$29,000 on terms according to the contract as it was drawn up later, is that correct?

A. That is right.

Q. Then the only contingency on your purchasing at that [131] time was your ability to liquidate your Fairbanks assets; now when did you start to liquidate your Fairbanks assets, Mr. Pickering?

A. Previous to the 21st of April.

Q. Previous to the 21st of April?

A. Uh huh.

Q. Did you make a trip to Fairbanks to bring that about? A. Yes.

Q. Could you tell us approximately when you went up to Fairbanks?

A. I think it was either the 16th or 17th of April.

Q. And would you mind telling us, sir, what the contingency was or what you went to Fairbanks to accomplish, Mr. Pickering?

A. Will you ask your question more directly; I didn't quite follow you.

Q. All right, sir, I am sorry. I will strike the question and ask you another one. Just exactly what was it that you went to Fairbanks to do?

A. I went to Fairbanks to raise money for the exact purpose of buying out the L-W Chocolate Shop, the deal to take place after the first of May.

Q. And, I am sorry, I missed the date on which you went to Fairbanks?

(Testimony of Herbert E. Pickering.)

A. Either the 16th or 17th of April. [132]

Q. Now, were you successful in your transaction in Fairbanks in raising the money or doing whatever it was you were going to do?

A. A part of it, yes.

Q. Could you give us the approximate date on which you returned from Fairbanks?

A. On the 20th of April.

Q. On the 20th of April? A. That is right.

Q. And at that time you had accomplished your transaction, had you? A. Not completely.

Q. What remained to be done, Mr. Pickering?

A. In order to liquidate certain assets it was necessary for me to take certain notes, paper, which I attempted to sell in Anchorage and was unable to.

Q. Yes, sir.

A. As a matter of fact I was unable to get the balance of the money from Fairbanks until the afternoon of May 1st.

Q. So, would you mind telling us how much of the money you had up until April 30th?

A. \$5,000.

Q. About how much, sir? A. \$5,000.

Q. And then there was one additional thousand that was [133] still coming from Fairbanks?

A. That is right.

Q. And that arrived on the afternoon of May 1st?

A. That is right.

Q. I believe you said that you and Mr. White had a definite understanding that the transaction

(Testimony of Herbert E. Pickering.)

was in no event to take place, I think were the words you used, until after May first?

A. That is true.

Q. Could I ask whether that was at your suggestion or Mr. White's suggestion?

A. I believe that I could answer that by saying that it was a mutual understanding.

Q. You understood that this was listed with the Eagleson Agency, is that correct?

A. I understood that it was listed with an agency; I didn't know which one.

Q. And that the agency had an exclusive right to sell until May first?

A. That is true.

Q. And then if any sale was made before May 1st a commission would have had to have been paid through the agency, you understood that?

A. I presume that Mr. White would have had to pay commission. [134]

Q. And so you and Mr. White agreed to not carry out this transaction until May 1st?

A. That is right. May I add that I was also aware of the fact that the place could have been sold in my absence in Fairbanks or up to the last day of April. May I also add that my liquidation of these assets in Fairbanks was the—the immediate need was to purchase the L-W Chocolate Shop, but I had just retired from the air cargo business in Fairbanks and was in the process of liquidating those assets anyway.

Q. Well, now, when did you first go about the

(Testimony of Herbert E. Pickering.)

preparation of the necessary papers—the conditional sales contract—do you recall that?

A. Yes, sir, on the 21st of April.

Q. 21st of April? A. That is right.

Q. Was that the date on which the contract which you later signed on May 1st was actually drawn up?

A. It was discussed and I presumed drawn up at that time.

Q. You had agreed on all of the features of the contract and as far as you know it was drawn up on April 21st? A. That is right.

Q. Did you and Mr. White go to the offices of Davis & Renfrew in order to get those details through? A. That is true.

Q. And all of the details of the contract were given to [135] them and they were told to go ahead and draw up the contract? A. That is right.

Q. As I understood it, I am just trying to get your testimony straight, between March 10th and the time shortly after the first of April when you held the first discussion with Mr. White about the purchase, your only purpose in being in the place was to learn the business, is that correct?

A. That is true.

Mr. Kay: No further questions.

Redirect Examination

By Mr. Renfrew:

Q. You state that you made up your mind with Mr. White on the details on or about the 21st of

(Testimony of Herbert E. Pickering.)

April, that was about when you returned from Fairbanks?

A. We discussed the details previous to my leaving Fairbanks.

Q. But you told Mr. Kay, did you not, that you came down to the office of Davis & Renfrew on the 21st of April? A. That is true.

Q. And at that time you gave someone in the office the information in connection with the sale of this property? A. I believe that is right.

Q. And you signed these papers on what date?

A. The first of May. [136]

Q. First of May?

A. Papers were not signed at the time the details were made.

Q. Did you ever see those papers when you came back there?

A. I have not seen those up to this day; they are in escrow at the bank.

Q. You did sign them? A. Yes, sir.

Q. Did you see them prior to the date that you signed them? A. Oh, yes.

Q. You had looked them over before you signed them? A. Thoroughly.

Q. Several days or the day——

A. I believe that Mr. White and I went to the offices and read them several days before the first of May, but then upon—and I believe that there was a small change or two, unimportant, and then on the first of May before we signed them we read them carefully.

(Testimony of Herbert E. Pickering.)

Q. Did you understand that this property could be sold at any time up to May the first and that you didn't have any deal with Mr. White?

A. That is true.

Q. You understood that all the time?

A. Yes, sir. And, if I may add, there is evidence by way [137] of telegrams to Fairbanks which would substantiate that truth. In other words, I was aware of the fact that was I not able to raise that money at that time that the place could easily have been sold to anyone who would offer that price or a higher price to Mr. White. He was going to sell.

Q. But did you understand that the Eagleson's could have sold the property or rather the real estate agent could have sold that property at a given figure, any figure, up and until May 1st and that you had no right to the property until after that option expired?

A. That is very true.

Q. You understood that?

A. Oh, yes, Mr. White was in full control. He had the right to sell it to anyone. Our deal didn't go until the first of May.

Q. Did you at any time discuss with Mr. White going to see the agent—the real estate agent?

A. Only what has been shown here that I preferred to deal only with Mr. White because of the fact that I had known Mr. White for several years and there was no need to go to any agency.

Q. Were you at all concerned about the fact that the agent might sell that property before May 1st to someone else?

(Testimony of Herbert E. Pickering.)

A. As I have previous said a moment ago, I was in the process of liquidating one business; I was searching for another [138] business. I was anxious to buy the L-W Chocolate Shop, but it wasn't too important. Had someone else bought it I had other plans.

Q. Your deal was not consummated until what date?

A. First of May, 1949.

Mr. Renfrew: I think that is all.

Mr. Kay: I think that is all.

The Court: Ladies and gentlemen of the Jury, we are about to recess the case now until ten o'clock tomorrow morning, at which time you should be back in the jury box.

(Whereupon, at 5:00 p.m., Monday, February 20, 1950, the proceeding was recessed until 10:00 a.m., Tuesday, February 21, 1950.) [139]

February 21, 1950

The Court: You may call the roll of the trial jury.

(Jurors' names were called and responded to.)

The Court: You may proceed.

Mr. Renfrew: I wish to call the defendant, Mr. White.

LAWRENCE A. WHITE

called as a witness on behalf of the defendant, having previously been duly sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Mr. White, you have been present in the courtroom during the entire trial of this case and you heard Mr. Rentschler testify, did you not?

A. Yes, sir.

Q. Now, do you have a definite recollection of his calling on you with regard to the extension of the contract?

A. I do.

Mr. Renfrew: Your Honor, I have to speak quite loudly because Mr. White is hard of hearing.

Q. I will ask you if you can relate as nearly as possible the conversation which took place between you and Mr. Rentschler on that occasion?

A. Well, Mr. Mitchell came in and he said he had a hot prospect to sell the business if I would give him an extension [142] on it and I said, "Well, I will give you until April 30th," and he said he

(Testimony of Lawrence A. White.)

thought he could sell it in that length of time if I would give him that much time on it and that was the conversation between Mr. Rentschler and I.

Q. You heard Mr. Rentschler testify that to the best of his recollection that conversation occurred approximately April the 8th? A. Yes, sir.

Q. Does that meet with your recollection?

A. That is about the time.

Q. That is about the time it occurred?

A. Yes, sir.

Q. Now, did Mr. Rentschler after that time bring in a prospect to your place of business?

A. He did not.

Q. At no time did you ever see one, is that correct? A. After that extension I did not.

Q. After that extension you didn't see anything?

A. Didn't see any at all.

Q. Now, you, of course, heard Mrs. Eagleson testify with regarding a conversation which took place in her office, I believe she stated, about April the 23rd? A. Yes, sir.

Q. Do you remember having a conversation with her in her place of business at that time or about that time? [143] A. I do.

Q. Will you relate to the jury what your recollection of that conversation is, in your own words?

A. Well, I told Mrs. Eagleson that I had a fellow that had wanted to buy the place but he couldn't afford to give that price.

Q. What price? A. \$45,000.

Q. Yes.

(Testimony of Lawrence A. White.)

A. And she asked me if I would have him to come over, and I says "Well, I will ask him and see what he will do," and he said "No, he wouldn't go over because he still couldn't afford to pay that price," so I told her if she could get that much money out of it to go ahead, but if not I would have to wait until after that April 30th and talk to him myself. So that is about all of the conversations I remember having with Mrs. Eagleson.

Q. Now, do you recall whether or not the price was mentioned as to what Mr. Pickering had offered? A. \$35,000.

Q. And do you recall whether or not there was any discussion about raising the price to \$37,000 and giving her two thousand?

A. That discussion did not come up, no, sir.

Q. Did you at that time reiterate to Mrs. Eagleson that [144] if she can sell the property at a figure which would let you out at \$35,000 that she, of course, had the listing and to go ahead and do so?

A. I didn't exactly understand that.

Mr. Kay: I will object to the question as leading and suggestive.

The Court: Will you repeat the question?

Mr. Renfrew: I will withdraw it.

Q. Have you stated the entire conversation between you and Mrs. Eagleson with regard to the sale of the property that you had with her at that time?

A. Well, not as I remember, no, sir.

Q. Was there anything more said at that time that you can recall?

(Testimony of Lawrence A. White.)

A. I don't think there was, no, sir.

Q. Did she say anything to you about having any immediate prospects for sale? A. She did not.

Q. How did you happen to go over to Mrs. Eagleson's office?

A. Well, I went over to talk to her to see if she had any prospects to sell it and I was just passing by there and I just knew it was listed with her and knowing it was listed with her I just stopped to talk to her to see if she had had any clients and that was the main reason for going over there.

Q. Was it in response to her phoning you or did you go [145] over there of your own volition?

A. My own; she didn't phone.

Q. You are sure of that? A. Positive.

Q. Did Mrs. Eagleson or Mr. Rentschler at any time during the original contract, in the interim, or after you granted the extension ever make you any offer for the purchase of your property?

A. Never did.

Q. You heard the testimony of this young man who was down at the freight shed some place who stated that he had a conversation with you? That is the boy that was the neighbor of Mr. Rentschler.

A. Easley?

Q. Easley, that is his name.

A. Well, I don't ever remember at any time ever having a conversation with that gentleman. He used to come into my place, was one of my customers, but I just spoke to him and that is all, I don't remember

(Testimony of Lawrence A. White.)

at any time ever having a conversation with him and I am positive I did not.

Q. Is it possible that you could have had a conversation? A. Well, I don't think so.

Q. You had no recollection? A. No, sir.

Q. Now, the other boy that testified—— [146]

A. ——Mr. Dayton?

Q. ——Mr. Dayton, do you remember ever stating to him that you had sold the place or you were selling the place to the man in the back or the man that was working in there?

A. I never discussed anything concerning business to Mr. Dayton. He was one of my employees—at that time he was not—but he was prior to this last extension, but I never discussed business with Mr. Dayton at all.

Q. Did he work there when Pickering worked there? A. No, sir, he did not.

Q. You have no recollection of stating to him that you were selling the place?

A. I have no recollection at all; in fact, I don't think I ever mentioned to him.

Q. Is it possible that you did?

A. No, I don't think so.

Mr. Renfrew: I think that is all.

Cross-Examination

By Mr. Kay:

Q. Mr. White, I didn't get whether you said positively that you did not have any conversation with Jack Easley down at the freight depot?

(Testimony of Lawrence A. White.)

A. I did not.

Q. You heard Mr. Easley's testimony here yesterday? A. Yes, sir, I did. [147]

Q. And it is your testimony that no such incident ever occurred? A. With——

Q. Easley?

A. That is right, I never even talked to him at all.

Q. Not a word of truth in anything that he said from the witness stand? A. How is that?

Q. There wasn't a word of truth in anything he said from the witness stand?

A. All that I have ever said to that fellow is spoke to him.

Q. So he was not telling the truth?

A. I never did hold a conversation with him.

Q. And the same goes for Mr. Dayton?

A. Well, I have talked to Mr. Dayton, but during that time Mr. Dayton was not even around my place, never did come into my place of business after he quit working for me.

Q. You heard Mr. Dayton testify that he was talking to you there in the shop and had inquired as to who these new faces were, meaning Mr. Pickering or his son, I suppose, and that you said "Yes, I am selling to those people." Now, did any such conversation occur?

A. I just answer that question just prior to this. He never was in my place of business and therefore I didn't talk [148] to him.

Q. Then it is your testimony that no such conversation occurred?

(Testimony of Lawrence A. White.)

A. I had no conversation with Mr. Dayton, absolutely.

Q. Then everything that Mr. Dayton said from the witness stand was not the truth?

A. Well, I don't say the man deliberately was not telling the truth, but I say that I didn't have a conversation with him.

Q. Well, if you didn't have a conversation with him, then his testimony was not the truth, is that right?

A. That is the way I would take it, yes, sir.

Q. Well, now you heard Mr. Pickering testify yesterday, did you not? A. I did.

Q. And did you hear Mr. Pickering testify that during the extension period Rentschler brought in one man—a very tall man—that he remembered?

A. I did, that is right.

Q. Do you remember that occasion on which Rentschler brought in a very tall man?

A. I certainly do.

Q. Do you recall who that was?

A. Well, if I remember his name was—this fellow by the name of Urand.

Q. Did you have any discussion with Mrs. Eagleson about [149] Urand and his offer to purchase?

A. I only talked with Mr. Rentschler about that.

Q. What conversation did you have with Mr. Rentschler about Eugran?

A. Well, the best I can remember, Mr. Rentschler came back and said he thought the fellows were

(Testimony of Lawrence A. White.)

interested, but they had to raise the money and they was having difficulty in raising the money.

Q. Any discussion with him about the amount of the down payment which you would require?

A. There was nothing said about that because the money hadn't been raised and they hadn't been able to raise the money yet, so that hadn't been discussed yet.

Q. You were requiring any prospects that Mrs. Eagleson produced to have a fifty percent down payment, were you not?

Mr. Renfrew: Objected to now, as the contract speaks for itself on that.

Mr. Kay: There may have been some later modification or oral instruction; the principal has the right to instruct his agent.

Mr. Renfrew: There may have been such an oral conversation, but we haven't heard anything about it, your Honor.

Mr. Kay: That is what I am asking him about.

The Court: The objection is overruled.

By Mr. Kay: [150]

Q. You may answer that question, Mr. White?

A. Would you ask it again?

Q. Yes, you had been requiring Mrs. Eagleson—any prospects that she produced to have a fifty percent down payment, had you not?

A. Not—no, I did not.

Q. Did you ever have any discussion with Mrs. Eagleson about the amount of the down payment required?

(Testimony of Lawrence A. White.)

A. I told her if she sold the place for \$45,000 I would like to have in the neighborhood of \$12,000 down on it.

Q. Are you sure that wasn't \$20,000?

A. I am positive it wasn't.

Q. Now, you heard Mr. Pickering—or—Did you hear Mr. Pickering testify that early in April shortly after April 1st you began negotiating with Mr. Pickering for sale of the property, is that right?

A. I talked to Mr. Pickering during the month of April, yes, sir.

Q. How early in the month of April?

A. Well, I don't remember the exact date; it was, I would say, sometime around the middle of April sometime.

Q. Well, could it have been as early as the first week in April?

A. No. I think it was a little later on in the month than that. [151]

Q. Was it before or after you gave Mr. Rentschler the extension?

A. Well, if it was in the middle of April it must have been after.

Q. Was it after?

A. Well, I presume it was.

Q. Then if you gave Mr. Rentschler the extension on April 8th, a few days later you began negotiating with Mr. Pickering, right?

A. Yes, sir.

Q. Right? A. Yes, sir.

(Testimony of Lawrence A. White.)

Q. Did you have a conversation with Mr. Rentschler about Mr. Pickering?

A. I never did mention Mr. Pickering's name to Mr. Rentschler, no, sir.

Q. Did you hear Mr. Rentschler testify that early in April you requested him to help you get Mr. Pickering up to a higher figure?

A. I heard that, yes, sir.

Q. Did you have such a conversation with Mr. Rentschler? A. I did not.

Q. No such conversation ever occurred?

A. No such conversation.

Q. Did you request Mr. Rentschler to assist you in stimulating [152] Mr. Pickering to a higher price? A. No, sir.

Q. Did you tell Mr. Rentschler not to contact Mr. Pickering? A. I did not.

Q. Never discussed Mr. Pickering with Mr. Rentschler at any time? A. At any time I did not.

Q. You are familiar with Plaintiff's Exhibit 1, are you not, Mr. White? A. Yes, sir.

Q. And you understood, did you not, Mr. White, that if a sale was made by you or anyone within 60 days after the termination of that agreement or the extension thereof to anyone with whom Mrs. Eagle-son or any of her representatives had negotiated that you would be liable for the commission?

Mr. Renfrew: Just a moment, I wish to make two objections, your Honor; one is this, this is improper cross-examination, not having been touched upon upon direct examination, and the other is the

(Testimony of Lawrence A. White.)

Court limited me on examination of the contract because the contract spoke for itself. I wasn't able to ask the question "What they understood?" for it and the Court sustained the objection.

The Court: This isn't a question directed to the contents of the agreement; it is proper cross-examination as [153] as I view it. Objection overruled.

Q. (By Mr. Kay): You may answer the question.

A. Okeh, ask me again.

Mr. Renfrew: Your Honor, I wish to ask the Court's indulgence. I would like to have you again review my last objection. I made the same request of Mr. Rentschler and of Mrs. Eagleson and the Court refused my interrogation of those questions.

The Court: I don't recall anything of that kind.

Mr. Renfrew: Well, I will stand on the record, your Honor; I asked them questions about the contract, what their understanding was, and counsel got up and objected on the grounds that the contract spoke for itself, and this very question is what the contract speaks for itself.

The Court: Of course it is one thing to ask the witness what his understanding of a contract is because it is too general and to be anything, but when you call his attention to a specific provision in the contract and ask him if he doesn't understand that, there isn't anything objectionable about that it is proper cross-examination.

Mr. Renfrew: Your Honor, may I ask what provision of the contract this question refers to?

(Testimony of Lawrence A. White.)

The Court: It is the 60-day provision.

Mr. Renfrew: Then can I ask counsel to confine his [154] question to that; he has asked three questions, he has asked about three different places in the contract in that question.

Mr. Kay: Maybe if I start over again, your Honor, I can satisfy Mr. Renfrew.

Q. Mr. White, you understood, did you not, that this contract covered a sale made during a period of 60 days after the termination of the contract if such a sale was made to any person with whom the agent, Mrs. Eagleson, had dealt? A. Yes, sir.

Q. So you understood then that if Mrs. Eagleson or Mr. Rentschler negotiated with Mr. Pickering during the month of April and you later sold to Mr. Pickering within 60 days after the 1st of May that you would have to pay Mrs. Eagleson a commission?

A. Well, I understood if I negotiated with anyone that came to me, certainly.

Q. You knew you would have to pay a commission? A. Yes.

Q. What was Mrs. White doing around the place during the month of April, Mr. White?

Mr. Renfrew: I object now that this witness, your Honor, was originally called by the plaintiff as his own witness and we did not cross-examine this witness on his testimony at that time and then at a later date we put him on as our witness and we asked him questions and now counsel has the [155] right, according to my understanding of the law, to cross-examine him on the points brought out by the

(Testimony of Lawrence A. White.)

direct examination. Now, I feel that I have a right to objection on the grounds that counsel is now seeking to bring out matters which were not brought out on direct examination and he has the advantage in doing it by cross-examination allowing him to ask leading direct questions which is not proper, your Honor. He can call this man back as his own witness in rebuttal if he wishes to do so, but he is going clear outside the scope of the direct examination.

The Court: You mean of your direct examination?

Mr. Renfrew: Yes, certainly he is.

The Court: I don't think that the scope is so limited. The cross-examination is not limited to the very matters the witness is questioned about in direct; the scope of it is broader than that and this is clearly, I think, within the scope. Objection overruled.

Q. (By Mr. Kay): You may answer the question, Mr. White.

A. Why, she was working there; she was doing cashier work; she was dipping chocolates. I guess that is about all.

Q. She was present in the shop every day during the month of April, would you say, Mr. White?

A. Yes.

Q. Did she know of your negotiations with Mr. Pickering? [156]

A. No, I don't believe it was ever discussed; never did discuss it.

Q. At any time during the month of April?

(Testimony of Lawrence A. White.)

A. With my wife?

Q. Yes, sir? A. No, sir.

Mr. Renfrew: Do you have reference to the discussions with Mr. Pickering with regard to the sale or his employment?

Mr. Kay: The sale I am talking about.

Q. Did you discuss the sale of the business to Mr. Pickering with your wife during the month of April? A. I answered that.

Q. You did not? A. No, sir.

Q. Your wife was there every day, I think you said? A. Yes, sir.

Q. Was she a partner in the business?

A. Yes, sir.

Q. And you were negotiating with Mr. Pickering all during the month or at least in the middle of the month on, were you not?

A. From the middle of the month on, I would say.

Q. You had discussions with him and agreed on a price, did you not?

A. We discussed it; didn't agree upon nothing, no, sir, [157] not until after April 30th.

Q. Did you go down to the office on or about April 21st and prepare the contract which you later signed?

A. We went down there and talked it over.

Q. And you went down later and looked over the contract? A. May 1st.

Q. Are you sure you didn't go down as Mr. Pickering testified yesterday you went first and gave him

(Testimony of Lawrence A. White.)

the notes and went back and looked at the contract?

A. We went down around the 20th—well, I don't remember the exact date.

Q. Before the 1st?

A. Before the 1st and went back on the 1st and that was the last time we were down there.

Q. But while all this was going on you never mentioned the fact to your wife that you are selling to Mr. Pickering?

A. To my recollection, no.

Q. Could your recollection be mistaken, Mr. White?

A. Well, I guess it is possible, sure.

Q. So, it is possible that you might just casually mentioned to your wife about selling to Mr. Pickering?

A. I talked to my wife about it on May 1st.

Q. You sprung it on your wife as a surprise on May 1st?

A. I don't know that it was a surprise.

Q. Was your wife in the shop when Mr. Rentschler came in [158] the shop to get the extension?

A. I don't know.

Q. It was during the month of April?

A. Certainly.

Q. And you say your wife was in the shop all the time during the day?

A. There were times when we both were out; I don't remember whether she was in or out.

Q. Did your wife—were any of the discussions

(Testimony of Lawrence A. White.)

with Mr. Rentschler held in the presence of your wife during the month of April, Mr. White?

A. I would say no.

Q. Mr. Rentschler was in several times, was he not?

A. Oh, not on that particular thing, no, sir; he might have been in there to have lunch or something.

Q. Have a cup of coffee?

A. Possibly was, I don't remember.

Q. And he brought in at least one prospect after April 8th, didn't he?

A. No, sir, not to my knowledge.

Q. He brought in this tall man?

A. That was prior to this new contract.

Q. That was prior to the extension?

A. That was way back in July or August sometime right after the first contract was drawn up with—— [159]

Q. It was your testimony then that after April 8th when you granted the extension he never brought anyone in to look at the place?

A. Not to my knowledge; he never introduced them to me if he did.

Q. Well, I asked you previously whether or not you heard Mr. Pickering testify that during the month of April Mr. Rentschler brought in a tall man, might have been from Portland, did you hear Mr. Pickering testify to that?

A. Well, I heard him testify, sure, but I don't remember him coming in the month of April. I thought it was before the month of April.

(Testimony of Lawrence A. White.)

Q. In fact, you thought it was back last summer?

A. I thought it was right after the other contract, sure.

Q. And you don't remember him bringing anyone in the month of April? A. I do not.

Q. Do you know whether or not your wife had any conversations with Mr. Rentschler during the month of April?

A. My wife doesn't know Mr. Rentschler.

Q. She doesn't know him?

A. She just met him one time and I don't think she would recognize him if she met him on the street today.

Q. Did your wife—your wife signed the original contract which—I guess it has been returned—the original authorization [160] to sell, did she not?

A. That is right.

Q. And she was in the shop every day during the month of April? A. Sure.

Q. She knew that you had given the extension to Mr. Rentschler? A. Yes, she knew that.

Q. Did she make—she didn't make any objection to that, did she, Mr. White?

A. No, she did not.

Q. But you don't know whether or not she ever had any conversations with Mr. Rentschler—casual conversations in the shop?

A. Not after the April the 8th, no, sir.

Q. Now, you, in your conversation with Mrs. Eagleson in April, was that about April 23rd?

A. Well, approximately, yes, sir.

(Testimony of Lawrence A. White.)

Q. How many days was that after you and Mr. Pickering had gone down to Davis & Renfrew's office and drawn up this contract?

A. Well, it was about, I would say, it was something about three or four days later probably.

Q. Then at the time you had the discussion with Mrs. Eagleson you had already agreed with Mr. Pickering on the [161] total sale price—the amount to be paid down and the amount to be paid each month, right?

A. Providing Mrs. Eagleson didn't sell the business.

Q. Yes. Did you tell that to Mrs. Eagleson?

A. I told Mrs. Eagleson that she had the exclusive on it until April 30th and I would not sell to anyone.

Q. And did you tell her that you had agreed with Mr. Pickering on all of the terms of the sale?

A. No, I did not.

Q. But you did tell her that your price to Mr. Pickering was \$35,000?

A. We discussed that, yes, sir.

Q. You are sure you said \$35,000 and not \$30,000?

A. 35.

Q. Didn't you, as a matter of fact, complain about the fact that you could only get \$30,000 from Mr. Pickering and you just couldn't afford to take that and pay a commission?

A. No, sir.

Q. Never said any such thing?

A. No, sir.

Q. And you knew that if you sold during the

(Testimony of Lawrence A. White.)

month of April you would have to pay a commission to Mrs. Eagleson?

A. Providing a client came through her.

Q. Whether or not the client came through her if you sold during the month of April? [162]

A. If she was instrumental in getting the party to buy, yes, sir.

Q. Didn't you understand that you had to pay a commission during the month of April regardless of whether she had anything to do or not?

Mr. Renfrew: I don't so understand that?

Mr. Kay: I am asking whether he understood it.

Mr. Renfrew: I object to this type of question on the grounds that it is specifically covered in the contract and I reiterate my objection on the same basis that the Court sustained Mr. Kay's objection yesterday—the contract speaks for itself.

The Court: It is not so much what the contract speaks for but the witness or party to the contract may be questioned as to what he did under it.

Mr. Renfrew: I would like to take a recess and let Your Honor review the record as to my questions of Mr. Rentschler and Mrs. Eagleson, my very words, unless I am absolutely mistaken—"Did you understand thus and so from that contract?" Counsel jumps up and objects and Your Honor sustains it on the grounds that the contract spoke for itself notwithstanding what she said; you can't alter the terms of a written contract.

The Court: That is not my recollection of what occurred awhile ago. What I understood that what

(Testimony of Lawrence A. White.)

you were asking was what the contract stated rather than what they did [163] under the contract or what they understood.

Mr. Renfrew: I wouldn't ask Your Honor what the contract stated, surely it is right before them, "the contract states thus and so, what is your understanding of that?" why it speaks for itself and those are the very words.

The Court: If the Court rules as you think the Court ruled yesterday the Court is in error and the Court is not going to repeat the error today because it is a perfectly proper question. The objection is overruled.

Mr. Renfrew: I wasn't sure that the Court was in error.

The Court: If I ruled the way you said I did I was in error. Is counsel for plaintiff satisfied with the lack of an answer?

The Witness: I think I answered that "No."

Q. (By Mr. Kay): In your conversation with Mrs. Eagleson when you mentioned Mr. Pickering did you tell Mrs. Eagleson that Mr. Pickering was allergic to real estate dealers or words to that effect?

A. I told her that he wouldn't come over and do business with real estate because he couldn't afford to pay that much money.

Q. Did you ask Mrs. Eagleson—did Mrs. Eagleson ask you if she couldn't contact Mr. Pickering and try to get him to [164] raise that price a little bit? A. I think she did.

(Testimony of Lawrence A. White.)

Q. And isn't it a fact that you requested Mrs. Eagleson to stay away from Mr. Pickering?

A. That is not true, no, sir.

Q. You were perfectly willing that Mrs. Eagleson should deal with Mr. Pickering?

A. I didn't understand that?

Q. Were you perfectly willing that Mrs. Eagleson should attempt to deal with Mr. Pickering?

A. I still don't get you.

Q. Were you perfectly willing that Mrs. Eagleson should deal with Mr. Pickering?

A. Well, if he would go to her, certainly.

Q. And you didn't request her or Mr. Rentschler to go see him?

A. I did not at any time.

Mr. Kay: That is all.

Redirect Examination

By Mr. Renfrew:

Q. Was Mr. Pickering advised that this property was listed with an agent?

A. Was he? Yes, sir.

Q. He knew that it was listed with a real estate agent?

A. That is right. [165]

Q. And did he know the price that you were asking for it through the agent?

A. Through the agency, he did not.

Q. He didn't know what price you were asking through the real estate agent?

A. Oh, yes, he knew that.

Q. He did or did not?

(Testimony of Lawrence A. White.)

A. I told him that it was listed through real estate people for \$45,000.

Mr. Renfrew: That is all. We rest, your Honor.

The Court: Do you have any rebuttal?

Mr. Kay: Could I have a moment to confer here and check my notes, sir, and perhaps take our recess now?

The Court: We will take a recess for ten minutes.

(Short recess.)

The Court: Do you have any rebuttal?

Mr. Kay: No rebuttal.

The Court: You may proceed to argue the case.

Mr. Renfrew: I wish to make a motion, Your Honor.

The Court: In the absence of the jury, I presume?

Mr. Renfrew: I think so, sir.

The Court: The jury may retire until recalled.

Mr. Renfrew: If it please, Your Honor, at this time the defense wishes to make a motion for judgment—directed verdict of judgment for the defendant on the grounds that the [166] plaintiff has totally and wholly refused and failed to prove her case. The allegations in the complaint, Your Honor, specifically allege that during a certain period the plaintiff was instrumental in obtaining one John Doe Pickering to purchase said property and on the basis of the assistance which the plaintiff rendered a sale was made by the owner. The Court will recall that not only did Mrs. Eagleson testify

on the witness stand that she at no time ever consulted or talked with Mr. Pickering but that she not only never secured any offer from him but neither did she ever get a firm offer of any price from anyone else.

Now, I will go right back to the Exhibit "A," which is attached to the complaint, which is a copy of the contract of agency or employment which I believe, Your Honor, has to be read en toto. You can't just pick out just one part and read it, and I refer to the last paragraph of the Exhibit which states "I hereby list said property exclusively with said agent for a period of 60 days. I agree to pay said agent the commission set forth in this agreement if a sale is made within 60 days after the termination of this authorization to sell to parties with whom said agent negotiated during the time of the authorization to sell."

Now, Your Honor, there isn't one shred of evidence before the court that in any manner did Mrs. Eagleson or any of her sub-agents procure the cause of this sale to Mr. Pickering [167] and I submit that there is nothing in the record which the jury could infer that she in any way assisted in this sale.

Now, counsel has taken the position—I have read some of his proposed instructions—that it doesn't make any difference whether they had rendered any assistance in the procurement of the sale or not. He apparently takes the position that if at any time during this agreement or 60 days thereafter the owner sells the property to anyone whether ever contacted by Mrs. Eagleson or not that he would

have to pay the commission, and it is my understanding that it is the Court's responsibility to interpret this contract of employment. Now, if the Court interprets the contract that way the Court would have to practically instruct a verdict for the plaintiff because it is admitted here that the sale was made within a 60-day extension, certainly, of any existing contract. However, Your Honor, it is not denied—there is no proof and it is admitted by the plaintiff in this action—that she in no way ever at any time assisted in the sale to Pickering—in any way. And there is no shred of evidence that can ever connect Pickering with the Eagleson agency at all.

Now, it is obvious, Your Honor, that the defendant here did negotiate with Pickering for a sale of this property contingent upon the failure of the agency to make a sale. "If the agents failed to make a sale then," he says, "I will make a deal with you."

Now, it is our interpretation, Your Honor, that unless there can be shown some inducement or connection between the agency and the purchaser that she would not be entitled to any Commission and we fail to see where there is any evidence to go to the jury in view of Mrs. Eagleson's own statement that she never at any time—not only she didn't induce Mr. Pickering in any way but she didn't induce anybody else to even make an offer. How she can now claim, in view of the contract which makes particular reference to a sale being made without her inducement, how she can say now I am

entitled to a commission whether I had anything to do with it or not.

Now, there is only one question, Your Honor, that in my opinion could go to the jury in this case and I don't think that that is sufficient and that would be the question as to whether or not this sale was made prior to May the 1st. We have overwhelming evidence—we have a notary public seal on the instrument, we have the statement that the money wasn't even transferred, which isn't refuted, never even got here until after the 1st.

There was an agreement, true, which is admitted by all of the parties, there was an agreement, but that agreement was contingent upon the agent's authority to make a sale. Now, if counsel is correct in his contention, Your Honor, on the 25th day of June, for example, any one could have walked into Mr. White's place of business and said, "Is this place for sale?" [169] and White said, "What will you give me for it; I am going to leave the Territory," and the man said, "I will give you \$25,000 cash for it," "You have got it," and he writes him a check, Mrs. Eagleson could have claimed \$2,500 commission under the proposed instructions which were sent to the bench by Mr. Kay. I am satisfied, Your Honor, that that is not the interpretation of this contract. I don't see how it can be so stated when in view of that paragraph—the last paragraph of the last authorization to sell which I have read to Your Honor and which you have before you—which specifically states that if he pays after that 60-day extension it must be to someone whom the

plaintiff procured or induced to purchase the property.

The Court: Isn't the word that is used "negotiated"?

Mr. Renfrew: "To parties with whom said agent negotiated during the time of the authorization to sell." Your Honor is correct. I am quoting authorities when I said procuring. But Mrs. Eagleson testified on the stand that she never at any time negotiated with Mr. Pickering in any manner, shape or form.

The Court: Well, suppose it is argued that she didn't negotiate with him because of what the defendant told her?

Mr. Renfrew: Supposing that it is argued to that extent, Your Honor, she can't get up here and say that because the agent told me not to I didn't do something or because the [170] principal told me something I didn't do something.

The Court: She could argue further that it was not in good faith and done for the purpose of evading the payment of the commission.

Mr. Renfrew: But, Your Honor, it is further contended in this contract that she must be the producing party and there is not a shred of evidence here that Pickering ever heard of this place being for sale until after he was working there, never had any intentions of buying it and then only negotiated with the owner with the explicit understanding that the properties were listed with an agent whom he didn't choose to consult with knowing that

it could be sold by the agent up until the time of the expiration of the agent's agreement.

Now, certainly, we can't say that Mr. Pickering couldn't buy that property without consulting the agent, if he waited until after the expiration. He doesn't have to appear there.

Now, I am not just talking to hear myself heard, Your Honor, there are innumerable authorities following that rule and I have——

The Court: But it seems to me that the crux of the case is whether or not this transaction with the Witness Pickering did not amount to a sale or a contract of sale so as to bring it within that particular provision of the contract.

Mr. Renfrew: You mean that the question which I raised a moment ago that if the sale was tantamount to a sale being [171] made on the 21st or 22nd or 23rd of April? Now, I take this position, Your Honor, if the Court is considering an instruction along that line the Court in my opinion would have to go further and instruct that if Mr. Pickering understood that this place was listed and agreed that he had no valid right there until after May the 1st, which he has testified to, and, if, in fact, the consideration was not handed over until that time there could be no sale.

The Court: The Court doesn't instruct in that manner; that is, the Court doesn't pretend or attempt to recite the testimony or the salient fact. That is not a proper way to instruct.

Mr. Renfrew: I am reading the instruction of counsel.

The Court: The Court would have to probably submit the question to the Jury with the instruction that if they found it constituted a sale they then could find one way if not the other way but not attempt to recite any facts or circumstances.

Mr. Renfrew: By the same token Your Honor has raised a question, you have asked whether or not there was not a sale on the 20th—we will say, take a figure, 23rd of April—I will ask whether Your Honor, whether or not Mr. Pickering could not bring an action for specific performance when he knew that the agent had the exclusive right when he did not have the consideration and when he agreed that the papers [172] and the sale would not be consummated until after the expiration of that date, which aren't borne out—only by his testimony—but are borne out by the actual instrument of sale itself which was dated May 1st and executed before a notary public on that date or the date thereafter, May 2nd?

The Court: That is one way of putting it but don't forget that there is sufficient testimony here that would warrant the jury in drawing the opposite inference. There is enough testimony here so that it would have to be submitted to the jury for their determination.

Mr. Renfrew: For the purpose of the record I wish to call to the Court's attention 20 A.L.R., a case entitled Sunnyside Land & Investment Company v. John D. Bernier and Wife, Respondents. It is found at page 1261. It is on appeal from the Washington Supreme Court.

The Court: But hasn't the Washington Supreme Court laid down a different rule than the rule that obtains in every other?

Mr. Renfrew: In every other jurisdiction?

The Court: Yes.

Mr. Renfrew: That doesn't seem to be apparent from the reasoning.

The Court: It is not apparent from the reasoning in one case, but that seems to be the fact if I read some of these annotations correctly that Washington stands alone. [173]

Mr. Renfrew: In this particular case, Your Honor, Washington says that they are following the majority rule and they set forth innumerable cases which they followed on the point which decided the case on which is practically identical with the case which we have here. There is a question in the case over the point of the word——

The Court: I think if I recall correctly that in Washington they do not distinguish between an exclusive agency and an exclusive right to sell.

Mr. Renfrew: That point was raised in this case, Your Honor, and the Court very emphatically stated that they couldn't see the difference; they recognized the rule of the exclusive agency but they followed the majority rule. Counsel for the appellant attempted to make a differentiation between the exclusive right to sell and the exclusive agency but the Court couldn't see any differentiation in it.

Now, that is my reading of the case. But regardless of that I would like to have Your Honor look

at that case. I don't care whether you look at it now or look at it later.

The Court: The Court tried to look at it last night but someone ran off with the books.

Mr. Renfrew: Well, I did it, Your Honor. In view of the Court's ruling on the motion I would like to ask for a short recess so that Mr. Kay and I might meet with Your Honor in Chambers to get some idea as to how we might argue on this [174] contract in view of our not knowing what the Court's instructions are going to be.

The Court: Suppose we take a recess until two and you come into chambers say 15 minutes to two.

Mr. Renfrew: That is all right, if that is all right with Your Honor. I think we could have this case over with by three if we could argue this morning. I would like to keep going on it myself if Mr. Kay would. I have some other things to do.

The Court: Well, Counsel have handed me a lot of instructions here at the last minute and in order to do more than merely glance over them I have to have a little time myself.

Mr. Kay: I would prefer to wait until two to argue, Your Honor. I will waive reporting.

Mr. Renfrew: Yes.

The Court: Ladies and Gentlemen of the Jury, we are about to recess the case until two p.m., at which time you should be in the jury box. The Court will now be in recess until two p.m.

(Whereupon, at 11:30 a.m., Tuesday, February 21, 1950, the taking of testimony was concluded.) [175]

FEBRUARY 23, 1950

The Court: You may call the roll of the jury.

(Jurors' names were called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Ladies and Gentlemen of the Jury, we have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

When you were accepted as jurors in this case you obligated yourselves by your oaths to well and truly try the matter in issue between the plaintiff and the defendants, and a true verdict render according to the law and the evidence as given to you on the trial. That oath means that you will not be swayed by passion, sympathy or prejudice, and that your verdict will be the result of a careful consideration of all the evidence and the instructions of the Court as to the law.

Neither the statements of counsel engaged in the trial of this case, nor the allegations of the pleadings, except so far as they constitute admissions, are to be considered by you as proof of the facts to which they relate. You should not regard or consider the relative financial condition of the parties to the suit, nor the effect of your verdict upon the parties, or any of them, or attempt to arrive at a verdict based upon your individual or collective opinions as to the abstract principles of justice which should govern the case.

It is not for you to say what the law is or should be regardless of any idea you may have in that

respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

II.

By this action plaintiff seeks to recover damages in the sum of \$3500 for an alleged breach of contract as a real estate broker. She alleges in her complaint that on July 7, 1948, she was employed by the defendants to sell the L. W. Chocolate Shop in Anchorage for \$45,000 upon which her commission would be 10%; that subsequently the contract was extended to April 30, 1949, and that in April, the plaintiff was instrumental in obtaining a purchaser to whom the defendants, in April, the exact date being unknown to plaintiff, sold the property listed with her for \$35,000.

The defendants deny that plaintiff was instrumental in procuring a purchaser and allege that the sale was negotiated by them after the contract with plaintiff had expired, and that the contract was not extended by the defendant Erma R. White.

The burden of proving by a preponderance of the

evidence that plaintiff was instrumental in promoting a purchase by Pickering is upon the plaintiff.

The principal question for your determination is whether the property was sold during the life of the contract or any valid extension thereof.

III.

Under the contract between the parties, plaintiff's Exhibit No. 1, the plaintiff was given the exclusive right to sell the property described in the complaint for 60 days and, if the extension was valid, for the further period ending April 30, 1949, with the right to receive the commission agreed upon if the defendants sold the property during the life of the contract, or if they sold the property within 60 days after April 30, 1949, to any person with whom the plaintiff had negotiated prior to April 30, 1949.

Defendants contend that the extension referred to was not authorized or ratified by the defendant Erma R. White and that consequently neither she nor the partnership is bound by such extension.

You are instructed that authorization or ratification by a partner may be shown by direct evidence, as by acts or written or spoken words, or it may be inferred from the surrounding facts and circumstances. It is for you to say whether there are any facts or circumstances from which authorization or ratification by the defendant Erma R. White may be inferred. In determining this question you may take into consideration the fact that the contract with plaintiff, Exhibit No. 1, was executed by both defendants, the relations between them in the conduct of their business, the fact that the property

in question was sold by them shortly thereafter, and all the other facts and circumstances.

However, before you would be warranted in inferring ratification on the part of the defendant Erma R. White, it would have to appear by a preponderance of the evidence that she knew of the extension and had an opportunity to repudiate it, and that the situation was such that she was obliged to speak if she did not consent rather than remain silent.

If you find that the defendant Erma R. White did not authorize or ratify the extension referred to, then neither she nor the partnership would be liable, but the defendant Lawrence A. White would be personally liable to the same extent as the partnership would be if the extension had been granted by both partners.

IV.

It is contended by the plaintiff that the property was actually sold before April 30th to Pickering, but that the transaction was given the appearance of a sale after that date and, moreover, that she was dissuaded from negotiating with Pickering and that these acts were done by the defendants for the purpose of defrauding her of the commission.

Defendants contend that it was a bona fide sale which was not consummated until after April 30th, that their dealings with Pickering were open and aboveboard, and that so far as dissuading her is concerned, all they did was to lay before her the facts about Pickering.

You are instructed that the law requires the

utmost good faith on the part of the principal toward his agent. Each owes to the other the duty of performance according to the terms of their agreement.

In this connection, you are instructed that if you find from a preponderance of the evidence that at any time before April 30, 1949, Pickering agreed to buy and the defendants agreed to sell the property in question, and find that such agreement was unconditional and not contingent on the sale of the property by the plaintiff in the meantime, and further find that the formal execution of the sales contract, Plaintiff's Exhibit No. 2, was deferred to May 1, 1949, for the purpose of defrauding the plaintiff of her commission, you should find for the plaintiff in the sum of \$3500. On the other hand, if you do not so find, your verdict should be for the defendants.

You are also instructed that if you find that the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date.

V.

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By the preponderance of the evi-

dence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

VI.

Subject to the law as contained in these instructions, you are also the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence, except such evidence as is declared by the Court to be conclusive.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, there-

fore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony. In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you would decide whether to believe something told you out of court. You size up the witness in court in the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the truth, the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, and the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on the witness' credibility and the weight of his testimony. When a witness has a strong personal interest in the outcome of a case, the temptation to lie, or to color, distort or withhold the truth may likewise be strong. Notwithstanding that, however, you may find that he has told the truth.

What has just been said concerning interest in the outcome of a case is likewise applicable to bias

or prejudice against or disposition to favor, either party. In other words, you should bring to bear upon your consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which you, as reasonable human beings, have and exercise in every day affairs of life.

Accordingly, you should draw from the evidence in this case all deductions which appear to you to flow logically from such evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for proof of any fact in this case. A witness wilfully false in one part of his testimony may be distrusted in other parts. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal

to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

VII.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction and consider it by itself or separately from or to the exclusion of all the other instructions.

As you have been heretofore instructed, your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

VIII.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction, founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity or personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the

view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

IX.

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room the exhibits and these instructions, together with three forms of verdict.

If you agree upon a verdict during business hours, that is, between 9 a.m. and 5 p.m., you may have your foreman date and sign it and then return it into open court in the presence of the entire jury, together with these instructions and the unused forms of verdict. If, however, you agree upon a verdict after business hours, that is, after 5 p.m. one day and 9 a.m. the following day, you should similarly have your foreman date and sign it and seal it in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10 a.m. when the verdict will be received from you in the usual way.

Given at Anchorage, Alaska, this 23rd day of

February, 1950, and I have signed it as District Judge.

The Court: Any exceptions?

Mr. Renfrew: Before I make any formal objections, do you think this should be inserted on this one here, after that comma? The way this reads now—I know that is what you mean to say “* * * agreed to buy and the defendants agree to sell the property in question * * *,” that such agreement was unconditional; in other words, they can read that to take it if they find that they did agree, then such an agreement was unconditional, that would result. I know that isn’t what you intend to say.

The Court: This is just for the purpose of clarifying it.

Mr. Renfrew: Yes, it all—I know you intended to say that they also must find there that the agreement was conditional and not contingent upon the sale of the contract.

The Court: Suppose I just put the word “and” there?

Mr. Renfrew: And why do you say “further find” down here? Why not say “and if you find”?

The Court: All right.

Mr. Kay: Just the words “and find”?

The Court: “The property in question and find that.” What is the other?

Mr. Renfrew: I wish to make a formal objection to that portion of Instruction No. 4 commencing with line 28 wherein the paragraph starts “You are also instructed that *if find* the plaintiff would have negotiated with said Pickering but for the acts or

conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date.” for the reason that:

(1) That is not the law; and

(2) That there is insufficient evidence to warrant such an instruction.

The Court: The only question in my mind is not a question of law. As I indicated in Chambers I am not entirely satisfied that the evidence might justify——

Mr. Renfrew: That is going too far. I don't think there is any doubt upon when you say acts or conduct—in other words, if any. In other words is failure to tell them that it would be his act or conduct and I can't see any duty upon a man to run down a real estate agent and say, “I want to give you——”

The Court: I think it is plain enough that the acts would have to be affirmative in character.

Mr. Renfrew: It doesn't say so in that instruction.

The Court: I don't see how it could be understood otherwise; from the very nature of the question it would have to be that.

Mr. Kay: Any further objections?

Mr. Renfrew: No, those are the only objections I have.

Mr. Kay: I don't really have any formal objections, but I do wonder whether or not—Instruction

2. I think that is what you refer to when you say you are not offering any amendment.

The Court: Reading——

Mr. Kay: Is that what was said in the paragraph?

The Court: The only thing I suggested in terms of the contract——

Mr. Kay: ——to purchase. This is in obtaining a purchaser if it was instrumental in bringing about the purchase, something like that, I wouldn't have any objection because there is a different——

The Court: I thought you were going to amend but you never did. All I am intending to do in this Instruction is to re-summarize the pleadings in order to simplify the thing for the Jury rather than to send the pleadings in to them. It hasn't been my practice to ever send the pleadings into the Jury, at least where the pleadings are prolific. The Jury would be completely confused, so I attempt to summarize the pleadings that are relative to the case and I don't see how I could avoid——

Mr. Kay: The only thing is, I wonder if "instrumental in procuring the purchaser" means the same thing as "instrumental in bringing about a purchase"? I say that we were instrumental in obtaining him to purchase not in obtaining but instrumental in bringing about the purchase by him.

The Court: Then you think it ought to be "instrumental"?

Mr. Kay: In——

The Court: In obtaining——

Mr. Kay: In bringing about the sale.

The Court: Well, you say in obtaining.

Mr. Renfrew: You are amending my pleadings because the defendants deny that the plaintiff was instrumental in obtaining a purchaser.

Mr. Kay: I am not asking for any change in that; I am just saying that the burden of proving by a preponderance of the evidence that the plaintiff was instrumental in bringing about a purchase or in obtaining the final sale but I have not alleged that we were instrumental in procuring Pickering. I don't say we met Pickering and brought him down there; I say we were instrumental in bringing about the sale.

Mr. Renfrew: Instrumental in obtaining——.

Mr. Kay: In other words, in bringing about the final sale to Pickering.

Mr. Renfrew: Plaintiff was instrumental in—you have got obtaining Pickering to purchase and here he has got instrumental in procuring a purchaser.

Mr. Kay: Maybe I am not making myself clear.

Mr. Renfrew: In the pleadings you say, "Plaintiff was instrumental in obtaining Pickering to purchase said property," and the Judge has said here the burden of proving by a preponderance of the evidence that the plaintiff was instrumental in obtaining a purchaser."

Mr. Kay: There is a difference. Under this the plaintiff was instrumental in obtaining Pickering to purchase. In other words, it did something by which Pickering purchased but I don't claim that we procured Pickering there.

The Court: Suppose I said "in promoting a purchase"?

Mr. Kay: That would be better.

The Court: In promoting a purchase.

Mr. Kay: Is upon the plaintiff.

Mr. Renfrew: By Pickering.

The Court: Yes.

Mr. Kay: That is right in promoting a purchase by the defendant.

I have no further objections.

The Court: Ladies and Gentlemen of the Jury, in Instruction No. 2 you will see a few corrections made in pen and ink in a paragraph that will now read:

"The burden of proving by a preponderance of the evidence that plaintiff was instrumental in promoting a purchase by Pickering is upon the plaintiff."

You will see what the correction is and that, of course, governs rather than the way that it was first read to you.

The bailiffs may now be sworn.

(Oaths administered by Clerk.)

The Court: The Jury may now retire to the Jury Room to deliberate on a verdict in charge of the bailiffs.

(Whereupon, at 11:00 a.m., Thursday, February 23, 1950, the Jury retired to deliberate upon a verdict.)

United States of America,
Territory of Alaska—ss.

I, Oren J. Casey, the Official Court Shorthand Reporter for the District Court of the United States, Third Division, Territory of Alaska, hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in the above-entitled matter in said court at the time and place as set forth.

/s/ OREN J. CASEY,
Certified Shorthand Reporter.

[Endorsed]: Filed June 2, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, M. E. S. Brunelle, Clerk of the above entitled Court, Do Hereby Certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and pursuant to designation of counsel, I am transmitting herewith the entire original papers in my office dealing with the above entitled action or proceeding, and including specifically the reporter's transcript of the evidence introduced on the trial of the cause and all exhibits introduced on behalf of both parties to the

action, such record being the complete record of the cause pursuant to the designation filed herein.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above entitled cause by the above entitled Court on February 2, 1950, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: No. 12592. United States Court of Appeals for the Ninth Circuit. Lawrence A. White and Erma R. White, Appellants. vs. Clara M. Eagleson, Appellee. Transcript of Record. Appeals from the District Court for the Territory of Alaska Third Division.

Filed June 28, 1950.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12592

LAWRENCE A. WHITE and ERMA R. WHITE,
Appellants,

vs.

CLARA M. EAGLESON,

Appellee.

STIPULATION CONCERNING PRINTING OF RECORD

It is hereby stipulated and agreed by and between Davis & Renfrew, attorneys for the appellants, and Cuddy & Kay, attorneys for the appellee, that the entire record in the above entitled matter as submitted to the Court of Appeals by the District Court for the Territory of Alaska, Third Division, including reporter's transcript of evidence and all exhibits offered by both parties, and together with this stipulation and together with appellant's designation of points, if not included in the records sent forward by the Clerk of the District Court, shall be printed except those certain portions hereinafter particularly set forth, which portions are not deemed by the parties to be material to the determination of the questions raised by the appeal in this matter, and may be omitted from the printed record by the above entitled Court as follows:

1. Printed paper entitled "Judgment Roll."
2. Summons directed to the defendants.
3. Writ of Attachment filed November 4, 1949.
4. Notice of Attachment with return by the Bank of Alaska.
5. Notice of Attachment without any return.
6. Notice of Attachment returned with the service on Mr. Pickering.
7. Affidavit of Attachment.
8. Order concerning the setting of the case for trial.
9. Minute Order dated February 8, 1950, setting the cause for trial.
10. Writ of Attachment filed December 28, 1949.
11. Subpoena directed to Mr. Pickering.
12. Minute Order dated February 20, 1950, having to do with the selection of the jury.
13. Roll of jurors.
14. Verdict number two, not signed.
15. Verdict number three, not signed.
16. Stipulation of parties concerning supersedeas bond.
17. Supersedeas Bond.

Dated at Anchorage, Alaska, this 31st day of October, 1950.

DAVIS & RENFREW,
Attorneys for Defendants-
Appellants,

By /s/ EDWARD V. DAVIS.

CUDDY & KAY,
Attorneys for Plaintiff-
Appellee,

By /s/ WENDELL P. KAY.

[Endorsed]: Filed November 4, 1950.